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In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, APPELLANTS

v.

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
The questions are substantial	6
Conclusion	14
Appendix A	1a
Appendix B	9a
Appendix C	12a
Appendix D	13a
Appendix E	15a
Appendix F	19a

CITATIONS

Cases:

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632	5, 9
Dugan v. *Rank*, 372 U.S. 609	9
Edelman v. *Jordan*, No. 72–1410, decided March 25, 1974	11, 12, 13
Eisen v. *Carlisle & Jacquelin* (*Eisen II*), 391 F. 2d 555	13
Eisen v. *Carlisle & Jacquelin*, No. 73–203, decided May 28, 1974	12, 13, 14
Hawaii v. *Gordon*, 373 U.S. 57	9
Jimenez v. *Weinberger*, No. 72–€609, decided June 19, 1974	7
Johnson v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122	13
Kahn v. *Shevin*, No. 73–78, decided April 24, 1974	7
Land v. *Dollar*, 330 U.S. 731	9
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682	10, 11, 12

555-351—74——1

	Page
Cases con.:	
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61	8
Malone v. *Bowdoin*, 369 U.S. 643	10
Northern Natural Gas Co. v. *Grounds*, 292 F. Supp. 619	13
Richardson v. *Belcher*, 404 U.S. 78	7
Stanley v. *Illinois*, 405 U.S. 645	5, 8
United States Department of Agriculture v. *Murry*, 413 U.S. 508	9
Vlandis v. *Kline*, 412 U.S. 441	5, 9
Williamson v. *Lee Optical Co.*, 348 U.S. 483	8
Constitution, statutes, and rules:	
United States Constitution:	
Fifth Amendment	2, 5
Eleventh Amendment	11
53 Stat. 1377	8
62 Stat. 869	10
62 Stat. 930	10
62 Stat. 1005	10
81 Stat. 866	8
Social Security Act of 1935, Title II, 49 Stat. 622, as amended, 42 U.S.C. 401 *et seq.*:	
Sec. 405(g)	10
Sec. 405(h)	5, 10
Sec. 416(b)	7
Sec. 416(c)	3, 6, 7, 15a
Sec. 416(c)(5)	2, 15a
Sec. 416(e) (Supp. II)	3, 6, 7, 15a–16a
Sec. 416(e)(2) (Supp. II)	2, 16a
Sec. 416(f)	7
Sec. 416(g)	7
Sec. 416(k) (Supp. II)	3, 4, 8, 17a–18a
28 U.S.C. (1940 ed.) 41	10
28 U.S.C. 1331	5, 9, 10
28 U.S.C. 2282	4
28 U.S.C. 2284	4
Federal Rules of Civil Procedure:	
Rule 23(b)(3)	13
Rule 23(c)(1)	14
Rule 23(c)(2)	13

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OPINION BELOW

The opinion and order of the United States District Court for the Northern District of California (App. A, *infra*, pp. 1a–8a), are reported at 373 F. Supp. 961.

JURISDICTION

The judgment of the district court, which held unconstitutional 42 U.S.C. 416(c)(5) and (e)(2), was entered on April 16, 1974 (App. B, *infra,* pp. 9a–11a). A timely motion for reconsideration was denied on May 9, 1974 (App. C, *infra,* p. 12a). A notice of appeal to this Court was filed on May 15, 1974 (App. F, *infra,* pp. 19a–20a). On July 6, 1974, Mr. Justice Douglas extended the time for docketing this appeal to and including August 30, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the duration-of-marriage requirement in 42 U.S.C. 416(c)(5) and 42 U.S.C. (Supp. II) 416 (e)(2) violates the Due Process Clause of the Fifth Amendment.

2. Whether sovereign immunity bars this unit insofar as it seeks retroactive social security benefits.

3. Whether, in certifying this suit as a class action, the district court improperly placed the burden of notifying members of the class upon the government rather than upon the plaintiffs.

STATUTES INVOLVED

The statutes involved are reproduced in App. E, *infra,* pp. 15a–18a.

STATEMENT

This case involves the constitutionality of provisions of the Social Security Act that define the terms "widow" and "child" for purposes of entitlement to benefits under Title II of the Act. The particular pro-

visions involved provide that a surviving wife of a deceased wage earner who does not meet other specified conditions of eligibility may qualify for benefits if "she was married to [the wage earner] for a period of not less than nine months immediately prior to the day on which he died"[1] and that a surviving child who does not satisfy other eligibility requirements may qualify if it had been a stepchild of the wage earner for not less than nine months prior to the wage earner's death.[2]

The nine-month limitation is inapplicable if the Secretary of Health, Education, and Welfare determines that the wage earner could reasonably have been expected to live nine months at the time of the marriage, and (1) his death was either accidental[3] or in the line

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[1] The surviving wife of a deceased wage earner qualifies for benefits if (1) she is the mother of his child, (2) she legally adopted his minor child during their marriage, (3) he legally adopted her minor child during their marriage, (4) they legally adopted a minor child during their marriage, or (5) she was or would have been entitled to certain benefits upon application in the month prior to their marriage. 42 U.S.C. 416(c); App. E, *infra*, p. 15a.

[2] The surviving child qualifies for benefits if it was the child or legally-adopted child of the deceased wage earner, or in certain circumstances if the child was the grandchild or stepgrandchild of the deceased wage earner or his spouse. 42 U.S.C. (Supp. II) 416(e). See App. E, *infra*, p. 16a.

[3] Accidental death is defined by 42 U.S.C. (Supp. II) 416(k):

"For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries."

of active military duty, or (2) in the case of a remarriage to the wage earner after a divorce the widow or child would have met the nine-month durational requirement at the time of the divorce if the previous marriage had been terminated by death rather than by divorce. 42 U.S.C. (Supp. II) 416(k).

The facts in this case are not in dispute. On May 27, 1972, appellee Concetta Salfi married Londo L. Salfi, a wage earner fully insured under the Social Security Act. On November 21, 1972, less than six months after the date of the marriage, Londo L. Salfi died as a result of natural causes, *i.e.*, a heart attack. On December 8, 1972, appellee Concetta Salfi on behalf of herself and her daughter from a prior marriage, Doreen Kalnins, filed for mother's and child's insurance benefits on the account of Londo L. Salfi. The Secretary denied the applications initially and upon reconsideration because the applicants were not within the definition of "widow" and "child," respectively; they failed to satisfy the nine-month-duration-of-marriage requirement because Londo Salfi had died from natural causes less than nine months after the marriage.

Appellees then commenced this suit as a class action seeking declaratory and injunctive relief and retroactive benefits. A three-judge court convened pursuant to 28 U.S.C. 2282 and 2284, denied the government's motion to dismiss, which motion asserted, *inter alia,* that the court was without jurisdiction, that the suit was barred by sovereign immunity, and that

42 U.S.C. 405(h) specifically precluded review under 28 U.S.C. 1331. On cross-motions for summary judgment, the court held that the nine-month-duration-of-marriage requirement created a conclusive presumption that a marriage lasting fewer than nine months before the wage earner's death was entered into "for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled" (App. A, *infra,* p. 6a). The court held that this presumption violated the Due Process Clause of the Fifth Amendment to the United States Constitution "insofar as [it denied] plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits" (*id.* at 7a).

The court stated that "Congress clearly intended to prevent the use of marriage as a device for obtaining Social Security benefits to which persons would not otherwise be entitled" and that the duration-of-marriage requirement was a conclusive evidentiary presumption to achieve that purpose (*id.* at 6a). Relying upon this Court's recent decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, *Vlandis* v. *Kline,* 412 U.S. 441, and *Stanley* v. *Illinois,* 405 U.S. 645, the Court held the duration-of-marriage requirement to be unconstitutional and enjoined its application.

Although appellees had brought this action as a class action, the district court took no action with respect to the class until it granted appellees' motion for summary judgment. The court then certified the class as consisting of "all otherwise eligible surviving spouses and stepchildren of deceased wage earners

heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2)" (App. A, *infra*, p. 7a). It ordered the Secretary to notify all members of the class and to provide them benefits from the time of original entitlement. These retroactive benefits are estimated by the Social Security Administration to aggregate approximately $35 million.

On July 3, 1974, Mr. Justice Douglas stayed the judgment "to the extent that it orders payment of any benefits and sending any notice to members of the class" pending the Court's disposition of the appeal (App. D, *infra*, pp. 13a–14a).

THE QUESTIONS ARE SUBSTANTIAL

The district court invalidated significant provisions of the Social Security Act and awarded extensive retroactive benefits. The constitutionality of these provisions is a substantial question in the administration of the Act which warrants plenary review by this Court. The appeal also presents the additional substantial questions whether sovereign immunity bars this suit insofar as it seeks payment of retroactive benefits, and whether, in certifying this suit as a class action, the district court improperly placed the burden of notifying the members of the class upon the government rather than upon the plaintiffs.

1. Section 416(c) and (e) of the Social Security Act are valid legislative classifications defining eligibility for widow's and children's benefits under Title

II of the Act. The district court erred in labeling those provisions "conclusive presumptions" without applying principles of equal protection analysis required by this Court's decisions involving social and welfare legislation.

In *Richardson* v. *Belcher*, 404 U.S. 78, 81–82, this Court held that "[a] statutory classification in the area of social welfare is consistent with [equal protection] if it is 'rationally based and free from invidious discrimination.'" See also *Jimenez* v. *Weinberger*, No. 72–6609, decided June 19, 1974, slip op. at 8. Cf. *Kahn* v. *Shevin*, No. 73–78, decided April 24, 1974. Under this standard the statutory definitions of "widow" and "child" contained in Section 416(c) and (e) of the Act are constitutional.

The Social Security Act did not originally provide for survivors' benefits. When such benefits were added in 1939, Congress also determined that it was necessary to protect the Social Security Trust Fund against claims arising from the manipulation of conditions of eligibility. In general, eligibility for benefits under Title II of the Act is based on the existence of a familial relationship and each of the relevant statutory definitions contains a waiting period designed to deter the creation of relationships solely for the purpose of benefit eligibility. See, *e.g.*, 42 U.S.C. 416(b) ("wife"); 42 U.S.C. 416(c) ("widow"); 42 U.S.C. 416(e) ("child"); 42 U.S.C. 416(f) ("husband"); 42 U.S.C. 416(g) ("widower").

There has been a history of continuing revision of

555-351—74——2

the statutory provisions[4] concerning eligibility which illustrates the phenomenon, often approved by this Court, of Congress dealing with a problem "one step at a time." See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The creation of an exception to the waiting period for accidental death (Section 416(k)) merely illustrates this principle and is not—as the district court held—a ground for invalidation of the statutory scheme.

The nine-month-duration-of-marriage requirement is a valid objective standard for the furtherance of a legitimate legislative goal. It avoids the expense and administrative burden which would be required by a subjective inquiry on a case by case basis. It reflects a congressional judgment as to a reasonable time within which the spouses' relationships and expectations could justifiably become fixed—at least for purposes of this social insurance program. Although it may result in hardship in some cases, the classification thus created is not "invidious."

This Court's "conclusive presumption" decisions, relied upon by the district court, are inapposite here. The instant classification neither touches on fundamental rights (*Stanley* v. *Illinois*, 405 U.S. 645 (right

[4] The duration-of-marriage requirement has been progressively relaxed in light of congressional experience. Thus, the original rule required a twelve-month waiting period (53 Stat. 1377), which was subsequently been reduced to nine months, 81 Stat. 866. Congress has enacted additional provisions which waive the duration-of-marriage requirements in many instances. See p. 3, n. 1, *supra*.

to custody of one's own children)), nor is it so arbitrary as to constitute a denial of due process of law (*Vlandis* v. *Kline*, 412 U.S. 441 (residency status for university students permanently fixed by their address at time of application); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (entire household denied food stamps for twelve months where one member was declared a tax dependent in a prior year)). Moreover, unlike the regulation involved in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, the statutory definitions cannot fairly be said to impose a burden on the right of decision in matters of marriage and family life, since persons excluded as beneficiaries under the definitions are not denied benefits which they would have received had they not married.

2. The district court took jurisdiction over this action under 28 U.S.C. 1331, which grants jurisdiction over civil actions involving more than $10,000 which arise "under the Constitution, laws, or treaties of the United States." We submit, however, that this class action, at least insofar as it sought retroactive benefits, is barred by sovereign immunity.

The suit is one against the sovereign because "the judgment sought would expend itself on the public treasury" (*Land* v. *Dollar*, 330 U.S. 731, 738, quoted with approval in *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii* v. *Gordon*, 373 U.S. 57, 58). Thus, unless Congress has waived sovereign immunity, this suit cannot be maintained.

Section 1331 is not a waiver of sovereign immunity, but merely defines the kinds of cases over which the

district courts have jurisdiction. The only provision in the Social Security Act which waives sovereign immunity is 42 U.S.C. 405(g). That section is inapplicable here, however, since it provides for judicial review only "after any final decision of the Secretary made after a hearing." The Secretary's decision in this case was not made after a hearing, but on the basis of uncontested facts which, under the statute, bar the appellees from receiving benefits.

Not only does 28 U.S.C. 1331 not waive sovereign immunity, but the Social Security Act provides that no action may be brought under that section on any social security claim. The Act provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. 405(h). Prior to 1948, the substantive provisions of 28 U.S.C. 1331 were contained in Section 41 of Title 28 (1940 ed.). See 62 Stat. 869, 930, 1005.

Since there is no provision in the Social Security Act or elsewhere by which Congress has consented to a suit such as this, this action appears barred by sovereign immunity.

This Court has recognized, however, that sovereign immunity does not bar suit where the officer is acting pursuant to an unconstitutional statute. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11, 701–702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647. That exception, however, is inapplicable where what is sought from the sovereign is the retroactive

payment of moneys to which the plaintiffs assert they are entitled.

That is the teaching of this Court's recent decision in *Edelman* v. *Jordan*, No. 72–1410, decided March 25, 1974. *Edelman* was a class action against Illinois state officials to recover, *inter alia*, retroactive benefits under Aid to the Aged, Blind and Disabled (AABD)[5] that had been withheld from class members when the State failed to comply with federally-imposed timetables for processing applications. This Court reversed that portion of the court of appeals' decision that permitted recovery of such retroactive benefits against the State. Rejecting the plaintiffs' argument that such payments amounted to "'equitable restitution,'" the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (slip op. at 16), and, therefore were barred by the sovereign immunity principles of the Eleventh Amendment.[6]

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment are equally applicable to suits against the United States. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, also the dissenting opinion of Mr. Justice

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[5] AABD is a federal-state program of categorical assistance funded equally by the State and the Department of Health, Education, and Welfare, and administered by the State. *Edelman*, slip op., pp. 1–2.

[6] This is not a case where retroactive benefits are arguably justified to deter officials from calculated and flagrant violation of the law. Cf. *Edelman*, dissenting opinion of Mr. Justice Marshall, pp. 4–5. Here, the Secretary acted in compliance with an Act of Congress which he believes to be constitutional.

Frankfurter in that case, 337 U.S. at 708. *Edelman* thus establishes that a suit seeking the recovery from the federal government of retroactive welfare benefits is a suit against the sovereign that cannot be maintained unless sovereign immunity has been waived. Since, as discussed above, there has been no waiver here, at least with respect to retroactive benefits, sovereign immunity bars the suit.[7]

3. Finally, as this Court's recent decision in *Eisen* v. *Carlisle & Jacquelin* (No. 73–203, decided May 28, 1974) makes clear, the district court, in certifying this suit as a class action, erred in placing the burden of sending notice to the members of the class upon the government rather than upon the plaintiffs.[8]

Eisen was a class suit brought by an odd-lot trader in securities who himself sought damages of only $70 from certain brokerage firms for alleged violations of the Antitrust and Securities laws committed in the fixing of commissions in odd-lot trading. This Court

[7] The Court indicated in *Edelman* that prospective injunctive relief was appropriate in that case (slip op. at 15–16) (the point was also conceded by petitioners, *id.* at 12) to compel the state officials to comply with federal regulations for the processing of applications of welfare beneficiaries. The Court suggested that prospective relief was appropriate since the monetary consequences were "ancillary" to the substantive relief. See slip op. at 16. For the reasons stated in the text, however, we do not understand *Edelman* to authorize prospective injunctive relief in a case such as this, where the principal relief sought is itself an order to pay money to persons not eligible by statute. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, 337 U.S. at 691, n. 11.

[8] Since *Eisen* was decided after the district court decided the present case, that court did not have the benefit of this Court's decision.

held that Rule 23(c)(2) of the Federal Rules of Civil Procedure, which is applicable to suits for money damages under Rule 23(b)(3), requires that individual notice be sent "to all class members whose names and addresses may be ascertained through reasonable effort" (slip op. at 15), and that "where * * * the relationship between the parties is truly adversarial, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit" (*id.* at 20). Since Eisen was unwilling to pay for the sending of notices, this Court ordered dismissal of the class action (*ibid.*).

To the extent that this suit seeks retroactive benefits for members of the class, the suit, like the *Eisen* action, is in practical effect one for money damages. See *Edelman, supra,* slip op. at 16.[9] Thus, the class action aspects of the claim for benefits is governed by Federal Rule of Civil Procedure 23(b)(3). Under Rule 23(c)(2), as interpreted by *Eisen,* the district court should have placed the burden of sending notices to all potential class members upon the plaintiffs, to be borne "as part of the ordinary burden of financing

[9] *Eisen* dealt only with the notice requirements in Rule 23(c)(2), which apply to money damage suits governed by Rule 23(b)(3). Slip op. at 18, n. 14. In our view, however, the notice requirements codified in Rule 23(c)(2) apply also in other kinds of class action suits as a matter of due process. See *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564–565 (C.A. 2) (*Eisen II*). But see also *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (C.A. 5). Cf. *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636–637 (D. Kan.).

his own suit" (*Eisen, supra,* slip op. at 20), and not upon the government.[10]

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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[10] The district court's handling of the class action aspects of this case is inconsistent with *Eisen* in other respects. (1) The court deferred its class action ruling until it had decided the merits. Rule 23(c)(1) requires the court to make the class action determination "[a]s soon as practicable after the commencement of an action." As in *Eisen*, there was no occasion here to defer the class action determination until the merits; that determination did not involve any complex factual issues whose resolution would be aided by considering the merits. The class action determination could and should have been made at the outset of the litigation. Slip op. at 19. (2) The notice to the members of the class should also have been sent when the class action determination should have been made—at the beginning of the litigation, to give them the opportunity actively to participate in the suit or to withdraw from it. Cf. *Eisen, supra*, slip op. at 18.

APPENDIX A

In the United States District Court for the Northern District of California

Case No. C–73 1863 ACW

(Original filed March 22, —Clerk, U.S. District Court, San Francisco)

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS

Order Granting Plaintiffs' Motion for Summary Judgment

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

WOLLENBERG, *District Judge:* Plaintiffs Concetta Salfi and Doreen Kalnins brought this action on behalf of themselves and all others similarly situated to challenge the constitutionality of two sections of the Social Security Act under which plaintiffs were denied benefits as surviving spouse and child of a deceased wage earner. A three judge district court was properly convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear the action. Jurisdiction is vested in this court under 28 U.S.C. § 1331 since the action arises under the Constitution and laws of the United States and involves an amount in controversy exceeding $10,000. *White* v. *Bloomberg,* 345 F. Supp. 133, 141 (D. Md. 1972); *Hiss* v. *Hampton,* 338 F. Supp. 1141, 1145–46

555-351—74——3

(D. D.C. 1972); *Gainville* v. *Richardson,* 319 F. Supp. 16, 18 (D. Mass. 1970); Wright, Federal Courts § 33 at 116 (2d ed. 1970). The parties have stipulated that there are no material facts in issue, and the case is now before the Court on defendants' motion to dismiss and cross motions for summary judgment.

FACTS

Concetta Salfi married Londo L. Salfi, the wage earner, on May 27, 1972. On June 13, 1972, the wage earner suffered a severe heart attack and was hospitalized until June 29, 1972. Thereafter, on November 21, 1972, less than six months from the date of marriage, the wage earner died from the heart attack. On December 8, 1972, plaintiff Salfi filed her application for mother's insurance benefits and child's insurance benefits, on behalf of herself and plaintiff Doreen Kalnins (her daughter by previous marriage), respectively. These applications were denied both initially and on reconsideration.

The reason for the Social Security Administration's denial of Mrs. Salfi's application for benefits is expressed in the "Reconsideration Determination" attached as Exhibit "D" to plaintiffs' complaint. Under 42 U.S.C. § 402(g), a widow is entitled to mother's insurance benefits provided she qualifies as a widow under the terms of 42 U.S.C. § 416(c). Section 416 (c)(5) excludes from the category of "widow" any woman who was married to a deceased wage earner "less than nine months immediately prior to the day on which he died * * *." Under 42 U.S.C. § 402(d), a child is entitled to child's insurance benefits, provided he qualifies as a child under the terms of 42 U.S.C. § 416(e). Section 416(e)(2) excludes from the category of "child" any stepchild who has held that relationship to the wage earner "less than nine months

immediately preceding the day on which [the wage earner] died." The mother and stepchild bringing this action were denied Social Security Benefits as survivors of Londo L. Salfi because they failed to qualify as mother and stepchild pursuant to the exclusions of 42 U.S.C. §§ 416(e)(5) and (e)(2), respectively, as Mr. and Mrs. Salfi were married less than nine months before Mr. Salfi died.

DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss alleges that the jurisdictional requirement of over $10,000 in controversy is not satisfied, that the suit is barred by the doctrine of sovereign immunity, and that plaintiffs have failed to exhaust their administrative remedies.

It has been held in lawsuits of this nature that the amount-in-controversy requirement is satisfied if the benefits each plaintiff may reasonably expect to recover as a result of the lawsuit exceed $10,000. *See* cases cited pp. 1–2 *supra; see Zahn* v. *International Paper Co.,* — U.S. — (No. 72–888 decided December 17, 1973).

In this action plaintiffs are alleging that in applying the sections here under attack, the Secretary of Health, Education and Welfare is committing acts prohibited by the United States Constitution. The rule is clear in this Circuit that even suits which otherwise would be barred by the doctrine of soverign immunity are nevertheless permissible if they allege unconstitutional acts on the part of the defendant. *State of Washington* v. *Udall,* 417 F. 2d 1310, 1318 (9th Cir. 1969); *Turner* v. *Kings River Conservation Dist.,* 360 F. 2d 184, 190 (9th Cir. 1966).

Also without merit is defendants' claim that plaintiffs failed to exhaust their administrative remedies.

Such exhaustion in this case would be futile and therefore is not a prerequisite for bringing the action. The purpose of the exhaustion requirement is to afford the government agency involved an opportunity to review its own decisions with the possibility of correcting its own errors and to afford the parties and the courts the benefit of the agency's experience and expertise in the subject matter in question. *McKart* v. *United States,* 395 U.S. 185 (1969); *Parisi* v. *Davidson,* 405 U.S. 34 (1972). The defendants concede there are no material facts in issue here. There is nothing for the agency to apply its expertise to, nor is there a claim that the agency has erred in interpreting or applying the sections under attack. The only question before this Court is whether those sections violate the United States Constitution, and this question is most appropriate for judicial decision. *McKart* v. *United States, supra; United States* v. *Hayden,* 445 F. 2d 1365, 1375, n. 16 (9th Cir. 1971).

Defendants also contend this action is barred by the provision of 42 U.S.C. § 405(h) that "No action against the United States, the Secretary [of HEW], or any officer or employee thereof shall be brought under [28 U.S.C. § 1331] to recover on any claim arising under this subchapter." We think this provision was intended to do no more than codify the doctrine requiring exhaustion of administrative remedies, and therefore that it is inapplicable to this action for the reasons already stated. *See Gainville* v. *Richardson supra.*

Since defendants have presented no ground which would justify granting its motion to dismiss, that motion will be denied.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants have urged throughout this litigation that Congress may properly specify which classes of

persons are entitled to receive Social Security benefits and which classes are not so entitled. The challenged provisions, according to defendants, are no more than an expression by Congress of which classes of persons are to receive benefits and which are to be excluded.

We reject defendants' strained interpretation of the provisions under consideration here as inconsistent both with the legislative history of the provisions and with other sections of the Social Security Act.

The purpose of the duration-of-relationship requirement found in the provisions here under attack is expressed in House Report No. 92–231, 92d Cong., 2d Sess. (1972), which contains the legislative history for the Social Security Amendments of 1972. In that Report the House Ways and Means Committee explained the purpose of the requirement as follows:

> This duration-of-relationship requirement is included in the law as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights.

H.R. Rep. No. 92–231, *supra, reprinted at* 3 U.S. Code, Congressional and Administrative News 5042 (1972). It is apparent that Congress intended these provisions to serve as a device to prevent the use of sham marriages to secure Social Security payments to which the parties to the marriages would not otherwise be entitled.

Furthermore, 42 U.S.C. § 416(k) provides relief from the exclusions of §§ 416(e)(5) and (e)(2) when the death of the wage earner was accidental. The only reasonable explanation for this relief which is apparent to this Court is that a bona fide accidental death establishes a good case that the marriage was not entered into for the purpose of securing Social Security benefits, and the presumption, therefore, is not

necessary then to prevent fraud. This exception to the duration-of-relationship requirement provides additional evidence that the purpose of the requirement is not to define the class of persons who may receive benefits.

Congress clearly intended to prevent the use of marriage as a device for obtaining Social Security benefits to which persons would not otherwise be entitled. As such the requirement constitutes a presumption that marriages like Mrs. Salfi's, which did not precede the wage earner's death by at least nine months, were entered into for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled. Because persons who find themselves in the positions of Mrs. Salfi and her daughter are afforded no opportunity to disprove the presumption, the duration-of-relationship requirement functions as a conclusive presumption, and it is the constitutional validity of this conclusive presumption that we shall now consider.

The Supreme Court has recently had occasion to address itself at length to the appropriateness of conclusive evidentiary presumptions. *Cleveland Board of Education* v. *LaFleur,* — U.S. — (No. 72–777 decided January 21, 1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972). In *Cleveland Board of Education* v. *LaFleur, supra,* the Court struck down a requirement that pregnant teachers go on maternity leave several months prior to the expected birth. Writing for the majority, Justice Stewart observed that like in *Vlandis* v. *Kline, supra,* the presumption then under attack was neither "necessarily nor universally true". Slip Op. at 13. The conclusive presumption therefore violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

No purpose would be served by repeating the Supreme Court's thorough discussion of the issue before us. As in *LaFleur* and *Vlandis,* the presumption we are considering is neither necessarily nor universally true. While the duration of the marriage may at times cast suspicion on the intention of the parties when they entered into it, such duration surely is not dispositive of the issue. We offer no suggestion of what hearing provision might satisfy the demands of due process in this instance. We hold today only that 42 U.S.C. §§ 416(c)(5) and (e)(2) are invalid and in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as they deny plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits.

ORDER

Accordingly, IT IS ORDERED that jurisdiction is conferred upon this Court by 28 U.S.C. § 1331; and

IT IS FURTHER ORDERED that 42 U.S.C. §§ 416(c)(5) and (e)(2) are declared invalid because they violate the Due Process Clause of the Fifth Amendment to the United States Constitution; and

IT IS FURTHER ORDERED that this action is certified as a class action pursuant to F.R. Civ. P. Rule 23, and that the class consists of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2); and

IT IS FURTHER ORDERED that defendants' motion for summary judgment and defendants' motion to dismiss the complaint are denied; and

IT IS FURTHER ORDERED that defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and the class they represent, provided said plaintiffs and class are otherwise fully eligible to receive said benefits; and

IT IS FURTHER ORDERED that defendants shall provide notice of this decision to all present members of the class by mailing such notice to each member of the class within ninety days of the filing of this order; and

IT IS FURTHER ORDERED that said notice be approved by the convening Judge before it is mailed to the members of the class and that the cause be remanded to the convening Judge for such further orders as may be appropriate.

Dated: March 22, 1974.

JAMES R. BROWNING,
U.S. Circuit Judge.

WILLIAM G. EAST,
U.S. District Judge.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX B

In the United States District Court for the Northern District of California

Case No. C–73–1863 ACW

(Filed Apr. 16, 1974—Clerk, U.S. District Court, San Francisco)

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS,

v.

CASPAR WEINBERGER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DEBACA, IN HIS CAPACITY AS DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER FOR REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, DEFENDANTS

JUDGMENT

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

Pursuant to the Order of March 22, 1974, granting plaintiffs' motion for summary judgment it is hereby adjudged and decreed:

(1) Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331.

(2) Title 42 U.S.C. §§ 416(c)(5) and (e)(2) are declared invalid because they violate the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) This action is certified as a class action pursuant to F. R. Civ. P. Rule 23, the class consisting of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and/or children's Social Security Survivors' Benefits by operation of 42 U.S.C. §§ 416(c)(5) and/or (e)(2).

(4) Plaintiffs' motion for summary judgment is granted and defendants' motions for summary judgment and to dismiss are denied.

(5) Defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine-month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and/or (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and each member of the class they represent, provided only that in each case such persons are otherwise fully eligible to receive the benefits.

(6) This Court, acting through the convening judge, shall retain jurisdiction of this case to administer the terms of this order and provide such other and further relief as may be just and proper.

(7) As soon as possible defendants shall prepare and submit to the convening judge for his approval a notice designed to inform the class of this decision. On or before June 22, 1974, such approved notice shall be sent by mail to each member of the class.

(8) Defendants shall reimburse counsel for plaintiffs, the Legal Aid Society of San Mateo County, for the filing fee of $15.00, their cost in the action.

JAMES R. BROWNING,
U.S. Circuit Judge.

WILLIAM G. EAST,
U.S. District Judge.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX C

In the United States District Court for the Northern District of California

Case No. C–73 1863 ACW

(Original Filed, May 9, 1974—Clerk, U.S. District Court, San Francisco)

Order Denying Motions for Stay of Judgment and for Reconsideration of Judgment

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS,

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS.

Before: BROWNING, *Circuit Judge*, and EAST and WOLLENBERG, *District Judges*

WOLLENBERG, *District Judge:* On April 16, 1974, summary judgment for plaintiffs was granted by a Three-Judge District Court. Defendants now move for a stay of that Judgment pending appeal and for reconsideration of the Judgment. All three Judges have reviewed the written arguments submitted by counsel for plaintiffs and defendants, and have agreed that defendants' motions should be denied.

Accordingly, IT IS ORDERED that defendants' motion for a stay of the Court's Judgment of April 16, 1974, is hereby DENIED, and

IT IS FURTHER ORDERED that defendants' motion for reconsideration of that Judgment is hereby DENIED.

Dated: May 9, 1974.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX D

Supreme Court of the United States

No. A–1211

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL., APPELLANTS

v.

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED

ORDER

UPON RECONSIDERATION of the application of the Solicitor General, and the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Northern District of California in case No. C–73 1863 ACW be, and the same is hereby, stayed only to the extent that it orders payment of any benefits and sending any notice to members of the class pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Northern District of California is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

IT IS FURTHER ORDERED that benefits be paid to the named appellees in accordance with the order of the United States District Court.

W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this Third day of July, 1974.
A true copy

Test: MICHAEL RODAK, Jr.,
Clerk of the Supreme Court of the United States.

APPENDIX E

42 U.S.C. 416(c) provides:

(c) Widow.

The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45.

42 U.S.C. 416(e) (Supp. II) provides:

§ 416. Additional definitions.

For the purposes of this subchapter—

* * * * *

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. 416(k) (Supp. II) provides:

> (k) Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.
>
> The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such

individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

APPENDIX F

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL NO. C-73-1863-ACW

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, IN HIS CAPACITY AS DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER FOR REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that the defendants hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the Judgment of the three-judge District Court entered in this action on April 16, 1974.

On April 25, 1974, the defendants timely moved for a stay of enforcement of judgment and reconsideration of judgment. Said motions were denied by the Court on May 9, 1974.

The defendants appeal from those adverse orders, as well as the Judgment entered April 16, 1974.

Dated: May 15, 1974.

JAMES L. BROWNING, JR.,
United States Attorney.
HOWARD T. CHANG,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
9 1975

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE FISCA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants

—v.—

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT FILED AUGUST 30, 1974
PROBABLE JURISDICTION NOTED NOVEMBER 11, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants

—v.—

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INDEX TO APPENDIX

	Page
Docket Entries	1
In the United States District Court for the Northern District of California:	
Order Granting Leave To Proceed In Forma Pauperis	6
Complaint	7
Notification and certification from the district court to the court of appeals that a three-judge court is required	23
Order appointing three-judge court and naming members of the panel	24

INDEX

Page

In the United States District Court for the Northern District of California:—Continued

Plaintiffs' motion for preliminary injunction 26

Stipulation to have case heard on cross-motions for summary judgment 29

Plaintiffs' motion for summary judgment 31

Plaintiffs' motion to consolidate hearing on the preliminary injunction with trial on the merits 33

Defendants' motion to dismiss or for summary judgment 34

Defendants' motion for stay of enforcement of judgment and for reconsideration 36

In the Supreme Court of the United States:

Temporary stay order of Mr. Justice Douglas entered June 21, 1974 38

Order noting probable jurisdiction 39

DOCKET ENTRIES

Date		Proceedings
1973		
Oct 19	1.	Filed Order Granting Leave to Proceed in Forma Pauperis. RFP
	2.	Filed Complaint for review of Adm Action.
	3.	Filed Order for service other than by U. S. Marhal (Don B. Kates Jr.)
	4.	Filed order for service other than by U. S. Marshal (Jeanne Pritchard)
	5.	Filed Memo of points and auths in support of Application for preliminary injunction.
	6.	Filed summons on ret exec 10-19-73.
Oct 24	7.	Filed Supplemental return on service.
Nov 19	8.	Filed notification & certification from Dist Court to 9th CCA req. 3 Judge Court
Nov 27	9.	Filed ord appointing 3 Judge court, Judge James R. Browning, 9th CCA ACW S.F. Cal 94104, Judge Albert C. Wollenberg, 450 Golden Gate Ave, San Francisco, Calif. 94102; Judge William G. East, 1065 High Street, Eugene Oregon 97401. A copy of the complaint has been mailed to each of the above named judges.
Dec 17	10.	Filed Pltfs mo for preliminary injunction.
Dec 27	11.	Filed notice that hrg pltfs mo for preliminary injunction for Feb 8 1974 @2 p.m. CTRmm 7.
1974		
Jan 29	12.	Filed Defts' memo in opposition to the Pltfs mo for preliminary injunction affidavit Proposed Order.

Date		Proceedings
1974		
Jan 29		Mailed notice to the three judges court.
30	13.	Filed notice cont. hrg. on plts. mot. for prel. inj. fr. Feb. 8, 74 to Wed, Feb. 20, 74, 2:00 PM.
Feb 1	14.	Filed affidavit of H. T. Chang in support of mo for continuance of hrg.
1		Made and mailed notice to 3 judge court.
5	15.	Filed Withdrawal of counsel Fred h. Altshuler as counsel for ptfs in this action.
Feb 7	16.	Filed Stip for shortening time for notice of mo and to have case heard upon cross-mos for summ judg't. Hrg Feb 20, 1974 @2 p.m.
Feb 11	17.	Filed Pltf's mo for summ judg't.
	18.	Filed Pltf's mo to consolidate hrg on prelim injun with tr on the merits. Hrg Feb 20, 1974 @2 p.m.
11	19.	Filed notice and mo to dism or for summ judg't & Proposed Order.
	20.	Filed Pltf's memo of pts and auths in support of mo for summ judg't and in reply to deft's opposition memo.
	21.	Filed Defts notice of mo to dism or for summ judg't & Proposed ord. Hrg Feb 20, 1974 @2 p.m. copies mail to Judge East, Browning, & ACW.
Feb 15	22.	Filed deft's supp'l memo in support of deft's mot to dismiss or for summary judt.
Feb 20		Min Order Pltff's Prel. Inj., Def's Summ/ Judgt., Def's Dismissal All Submitted (ACW)

Date		Proceedings
1974		
Mar 22	23.	Filed Ord Granting Pltfs' Mo for Sum'ry Judgmt., to wit. *Order* Accordingly, IT IS ORDERED that jurisdiction is conferred upon this Court by 28 U.S.C. § 1331; and IT IS FURTHER ORDERED that 42 U.S.C. §§ 416(c)(15) and (e)(2) are declared invalid because they violate the Due Process Clause of the Fifth Amendment to the United States Constitution; and IT IS FURTHER ORDERED that this action is certified as a class action pursuant to F.R.Civ.P. Rule 23, and that the class consists of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2); and IT IS FURTHER ORDERED that defendants' motion for summary judgment and defendants' motion to dismiss the complaint are denied; and IT IS FURTHER ORDERED that defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and the class they represent, provided said plaintiffs and class are otherwise fully eligible to receive said benefits; and

Date	Proceedings
1974	
Mar 22	IT IS FURTHER ORDERED that defendants shall provide notice of this decision to all present members of the class by mailing such notice to each member of the class within ninety days of the filing of this order; and IT IS FURTHER ORDERED that said notice be approved by the convening Judge before it is mailed to the members of the class and that the cause be remanded to the convening Judge for such further orders as may be appropriate. Dated: Mar. 22, 1974 /s/ James R. Browning U. S. Circuit Judge /s/ William G. East U. S. District Judge /s/ Albert C. Wollenberg U. S. District Judge
Apr 16	24. Entered Judgment per ord of 3-22-74. (filed 4-15-74) (ACW, East, and Defts to reimburse pltfs counsel the $15 filing fee. (Browning. Mailed Clerk's not of entry of judgment to parties of record.
Apr 25	25. Filed Defts's Not of Mo For Stay of Enforcement of Judgmt and Reconsideration of Judgmt and Reconsideration of Judgmt. Pts & Auths; Affidavit and proposed orders. (No dates)
May 9	26. Filed Ord Denying Motions For Stay of Judgmt and for Reconsideration of Judgmt. (ACW)

Date	Proceedings
1974	
May 15	27. Filed Notice of Appeal to Supreme Court of the United States by defendants.
May 15	28. Filed Defts-appellants' Affidavit of Service re notice of appeal.
May 16	Mailed Clerks Notice of filing an appeal to parties of record.
May 22	29. Filed Designation of record by appellant and appellees.
May 22	30. Filed Pltfs letter to Court. (dated 3-7-74) from Legal Aid Society.
June 24	Made and mailed record on appeal to the Supreme Court
July 1	32. Filed receipt from the Supreme Court for the record on appeal
July 1	32. Filed Order from the Supreme Court RE Judgt. stayed only to the extent that it orders * * *
July 8	33. Filed C.C. of Ord from Supreme Court of U.S. that the judgmt of the USDC is stayed only to the extent that it orders payment of any benefits and sending any not to members of the class pending timely docketing of an appeal. Etc. (See file)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed October 19, 1973]

C. A. No. 73 1863 ACW

CONCETTA SALFI, ET AL., PLAINTIFFS

vs.

CASPAR WEINBERGER, ET AL., DEFENDANTS

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS

Upon the motion of plaintiff for leave to proceed in forma pauperis without prepayment of fees and costs, good cause appearing therefore:

IT IS ORDERED that said motion be and hereby is GRANTED and the plaintiff may proceed herein without prepayment of fees and costs.

DATED: Oct. 19, 1973.

/s/ Robert F. Peilham
Judge
United States District Court

[Filed October 19, 1973]

COMPLAINT

REVIEW OF ADMINISTRATIVE ACTION

[JURISDICTION]

1. This is an action to invalidate the provisions of 42 U.S.C. § 416(c) and (e)* which deny widow's and children's Social Security benefits on the basis of a conclusive presumption that, if the deceased wage earner did not live nine months after marriage, the marriage was a sham entered into solely in expectation of his death. Jurisdiction is conferred upon this Court by the Due Process Clause of the Fifth Amendment, by Title 28 U.S.C. §§ 1331, 1334, 1361, 2201 and 2202 and 5 U.S.C. 702.

2. The value of each of the individual pensions in controversy herein exceeds $10,000.00.

[PARTIES]

3. Plaintiffs CONCETTA SALFI and DOREEN A. KALNINS, mother and daughter, are citizens of the United States and residents of the State of California within the judicial district of this Court.

4. Defendant SOCIAL SECURITY ADMINISTRATION (SSA) is a sub-agency of the United States Government. Defendant CASPAR WEINBERGER is the Secretary of the DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (HEW). HEW is the parent agency of the defendant SSA.

5. Defendant FERNANDO E. C. DeBACA is the director of HEW Region Nine. Defendant JOHN F. RICHARDSON is the Commissioner of the defendant SOCIAL SECURITY ADMINISTRATION for Region Nine. The headquarters of SSA and HEW Region Nine

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* The challenged provisions are set out, along with the provisions of § 416(k)(1)(A), as Exhibit A to this Complaint.

are situated within the judicial district of this Court and Defendant DeBACA and RICHARDSON reside within said district.

6. Each of the individual defendants herein is sued for acts or omissions committed under color of legal authority and in his official capacity as an officer and employee of the United States and of the specified agencies thereof.

[CLASS ALLEGATIONS]

7. Plaintiffs bring this case for themselves and for all those similarly situated pursuant to Rule 23, F.R. Civ. P. The class thus represented includes all widows and stepchildren of deceased wage earners who are denied widow's or children's insurance benefits because the wage earner died within nine months of his marriage to the applicant or (in case of a stepchild) the applicant's mother. This class is so numerous that joinder of all its members is impracticable, but the questions of law and fact raised in this action are common and equally applicable to all members of the class. Pursuant to 42 U.S.C. § 416(c) and (e), defendants have refused to provide benefits to any member of the class on grounds applicable to all members thereof, making appropriate declaratory and injunctive relief for the entire class. An adjudication of this matter as a class action is necessary to forestall and foreclose the possibility of innumerable different determinations in discrete individual lawsuits brought to compel the payment of benefits. The claims of plaintiffs clearly exemplify those of the other members of the class and plaintiffs are able adequately to represent the interests of the class as a whole.

8. Plaintiffs seek convocation of a special three-judge district court as provided by 28 U.S.C. 2284. This is necessary since plaintiffs challenge the constitutionality, on its face, of Title 42 U.S.C. § 416(c) and (e), and seek both interlocutory and permanent injunctive relief to restrain the enforcement, operation and execution thereof.

[OPERATION OF THE CHALLENGED LEGISLATION]

9. Title 42 U.S.C. § 416(c)(5) and (e)(2) establishes what is in effect a conclusive presumption that any marriage contracted within nine months of the death of the deceased wage earner was a sham entered into simply to obtain Social Security benefits upon his death. Conclusively presuming that any marriage of less duration was entered into in expectation of the wage earner's death, these statutes define the deceased wage earner's spouse as not a "widow" and her child as not a "child" of the deceased unless he lived at least nine months after marriage. The harshness of the challenged statutes is mitigated (and their purpose highlighted) by § 416(k)(1)(A).* This provides that eligibility exists notwithstanding the provisions of the challenged statute if the marriage lasted at least three months and the wage earner's death was accidental—unless at the time of the marriage the wage earner "could not reasonably have been expected to live for nine months."

[FACTUAL CIRCUMSTANCES OF THE INDIVIDUAL PLAINTIFFS]

10. Plaintiff SALFI and her husband, the late Londo L. Salfi, were married on May 27, 1972. He died on November 21, 1972. Plaintiffs' application for mother's and child's insurance benefits was denied on March 15, 1973, and when reconsidered, that denial was confirmed on September 5, 1973. Sole grounds for the denial was that plaintiff SALFI and her husband had been married only five months and 25 days before his death rather than the nine months required by the challenged statutes. But for the operation of the challenged provisions Plaintiffs would have been eligible for the benefits they claimed. True copies of the certificates of marriage and death, and of the reconsideration decision, are attached hereto as Exhibit B, C, and D, respectively, and incorporated herein as if set out verbatim.

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* Set out in Exhibit A.

11. Plaintiff SALFI was given no opportunity to prove the truth as to her husband's health and the expectations entertained regarding it at the time of marriage—those facts being contained in the affidavit attached hereto as Exhibit E and incorporated herein as if set out verbatim. Briefly summarized, those facts are: that Mr. Salfi's death from heart failure was entirely unexpected and unforeseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarally determined) of another 21 years of life; that plaintiff and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together.

[LEGAL ALLEGATIONS]

12. The operation, enforcement, and execution of 42 U.S.C. § 416(c)(5) and (e)(2), have deprived and continue to deprive, plaintiffs of rights, privileges and immunities guaranteed and secured to them by the Constitution of the United States. Specifically:

(a) Plaintiffs have been denied the opportunity to prove salient facts regarding their eligibility by the operation of an unconstitutional conclusive presumption;

(b) Plaintiffs have been arbitrarily, capriciously and discriminatorily denied widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than nine months after the marriage;

(c) Plaintiffs have been arbitrarily, capriciously and discriminatorily denied widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than three months after the marriage and died by accidental means.

[SECTION 1985 ALLEGATION]

13. The individual and agency defendants have acted in concert with each other and with various of their employees and/or subordinants to deny to plaintiffs and their class alone the full and equal opportunity to prove in a due process hearing the pertinent facts as to their eligibility for Social Security benefits. As a result of such joint and concerted action by defendants and their subordinants and/or employees, plaintiff SALFI has been injured and deprived of property in benefits to the value of $181.70 per month while plaintiff KALNINS has similarly been injured and denied benefits to the value of $181.70 per month.

[EXHAUSTION OF REMEDIES]

14. Plaintiffs have fully and fairly presented the facts of their claims for benefits to their district Social Security Office and, upon denial, to the Regional Office for reconsideration. The latter's reconsideration decision (Exhibit D) correctly finds the facts, all of which are readily determinable by resort to official records of marriage and death. Plaintiffs have no quarrel either with the facts as found by the SSA or with the interpretation or application of the relevant law to deny plaintiffs' claims. There remain no factual matters to be determined and the only issue now in question is the constitutionality of the challenged statute—an issue which is beyond HEW's competence or jurisdiction to resolve.

[IRREPARABLE INJURY; NO ADEQUATE AT LAW]

15. Plaintiffs are presently being denied benefits to which they are entitled—benefits which alone, in view of the death of the family bread winner, can provide them the necessities of life. Thus plaintiffs are suffering and will continue to suffer irreparable injury unless this Court intervenes to enunciate and enforce their constitutional rights. Plaintiffs have no adequate remedy at law in that: (a) to obtain the benefits required by suits for

damages would require an infinite succession of litigation; and (b) the constitutional rights of which they are being deprived are not compensable in money damages.

[DECLARATORY JUDGMENT]

1. There is an actual and present controversy between plaintiffs and defendants in that plaintiffs contend that 42 U.S.C. § 416(c)(5) and (e)(2) are unconstitutional as presently written while defendants deny and dispute this. Therefore, plaintiffs desire, pursuant to 28 U.S.C. 2201 and 2202, a declaration of their and defendants' rights, privileges and duties and a declaration that the nine month conclusive presumption included in said statute is unconstitutional in that:

(a) It denies plaintiffs the opportunity to prove the salient facts regarding the eligibility by the operation of an unconstitutional conclusive presumption;

(b) It arbitrarily, capriciously and discriminatorily denies plaintiffs widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than nine months after their marriage;

(c) It arbitrarily, capriciously and discriminatorily denies plaintiffs widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than three months after the marriage and died by accidental means.

WHEREFORE, plaintiffs respectfully request relief as follows:

1. That a special three-judge panel be convened to hear this matter as provided in 28 U.S.C. 2284;
2. That this matter be certified as a class action pursuant to F.R. Civ. P. 23;
3. For declaratory relief as set out in the body of the complaint;
4. For mandatory and/or injunctive relief restraining defendants from denying widow's and children's benefits to plaintiffs and those similiarly situated simply because

the duration of the marriage was less than nine months required in 42 U.S.C. § 416(c)(5) and (e)(2) and ordering defendants to provide benefits, or an opportunity for a hearing on the genuineness of their status, to plaintiffs and all those similarly situated;

5. For damages or sums due and owing equivalent to the amount of benefits to which plaintiffs became entitled as of the date of said entitlement;
6. For attorneys' fees;
7. For costs of suit and such other relief as shall be necessary and proper.

DATED:

Respectfully submitted,

DON B. KATES JR.
BRUCE N. BERWALD
CARL L. MCCONNELL
FRED H. ALTSHULER
JOHN GANT
ALBERT H. MEYERHOGG
ELAINE D. CLIMPSON

Attorneys for Plaintiffs

By /s/ Bruce N. Berwald
BRUCE N. BERWALD

/s/ Don B. Kates Jr.
DON B. KATES JR.

VERIFICATION

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN MATEO)

I, CONCETTA SALFI, being duly sworn, state as follows:

I am the plaintiff in this action; I have read the foregoing Complaint and know the contents thereof; and I certify that the same is true to my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed on October 18, 1973, at Redwood City, California.

/s/ Concetta Salfi
CONCETTA SALFI

SUBSCRIBED and sworn to before me this 18th day of October, 1973.

/s/ Mary Hannah
Notary Public

[OFFICIAL SEAL]

Mary Hannah, Notary Public—California in San Mateo County. My Commission Expires September 28, 1976.

Exhibit A to the Complaint contained the text of statutes now reproduced in pertinent part in the appendix to the Appellants' Brief.

Exhibit B to the Complaint is a Certificate of the Registry of Marriage filed at the Recorder's Office of San Mateo County, California, certifying the marriage of Concetta Kalnins to Londo Salfi on May 27, 1972.

EXHIBIT "D"

HEALTH, EDUCATION, AND WELFARE
Social Security Administration

RECONSIDERATION DETERMINATION

Payment Center—San Francisco California

Name of Wage Earner or Self-Employed Person—Londo L. Salfi

Name of Claimant—Concetta Salfi
Concetta Salfi for Doreen A. Kalnins

District Office or Branch Office—San Mateo, California

Social Security Claim No.—571-03-7376

Type of Claim—Mother's Insurance Benefits
Child's Insurance Benefits

Determination:

Concetta Salfi filed an application for mother's insurance benefits and on application for child's insurance benefits on behalf of Doreen A. Kalnins on December 8, 1972. The applications were denied because Mrs. Salfi and the wage earner were not married for nine months prior to the wage earner's death. On April 25, 1973, the claimant requested reconsideration.

The issue to be resolved is whether the claimants are entitled to mother's and child's insurance benefits. This depends on whether Mrs. Salfi and the wage earner were married for nine months prior to the wage earner's death.

Section 202(g) of the Social Security Act provides that in order to become entitled to mother's insurance benefits a claimant must be the widow of the wage earner as defined in section 216(c) of the Act.

Section 216(c) of the Act defines the term "widow" as the surviving wife of an individual, but only if one of the following requirements is met: (1) she is the natural mother of his child; (2) she legally adopted his

child while she was married to him and while the child was under the age of eighteen; (3) he legally adopted her child while she was married to him and while the child was under the age of eighteen; (4) she was married to him at the time both of them legally adopted a child under the age of eighteen; (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died; or (6) she was entitled or potentially entitled to wife's, widow's, parent's, or childhood disability benefits under the Social Security Act, or widow's child's, or parent's insurance annuity under the Railroad Retirement Act.

Section 404.1114(a) of Regulations No. 4 of the Social Security Administration provides that the requirement that the widow be married to the wage earner for a period of not less than nine months prior to his death shall be deemed to be satisfied if the widow was married to the wage earner for a period of not less than three months prior to his death, and the wage earner's death was either accidental (as defined in paragraph (b) of this section) or in the line of duty while he was a member of a uniformed service serving on active duty.

Section 404.1114(b) of the Regulations provides that the death of an individual is accidental if the individual receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives the bodily injuries. Death from natural causes is not an accidental death.

Section 202(d) of the Act provides that in order to become entitled to child's insurance benefits, a claimant must be the child of the wage earner as defined in section 216(e) of the Act.

Section 216(e) of the Act defines the term "child" as the child, legally adopted child, grandchild, or stepchild who has been a stepchild not less than nine months immediately prior to the wage earner's death.

Section 404.1114(a) of the Regulations also provides that the requirement that a stepchild be a stepchild not less than nine months shall be deemed to be satisfied

if the stepchild was a stepchild for not less than three months and the wage earner's death was accidental or in the line of duty.

Mrs. Salfi filed an application for mother's insurance benefits on December 8, 1972. She stated on her application that she married the wage earner on May 27, 1972, and that the wage earner died on November 21, 1972. She submitted a marriage certificate and a death certificate verifying these dates. Mrs. Salfi also filed an application for child's insurance benefits on December 8, 1972. She stated that Doreen A. Kalnins was the stepchild of the wage earner and had never been legally adopted by him.

The wage earner's death certificate shows that his death was due to arteriosclerotic heart disease and that the immediate cause of his death was "acute myocardial infarct." Mrs. Salfi signed a statement indicating that she agreed that the wage earner died from natural causes.

Mrs. Salfi was married to the wage earner for a period of less than nine months. Mrs. Salfi does not meet any of the requirements in section 216(c) of the Act. Although she was married to the wage earner for more than three months, the wage earner's death was not accidental or in the line of duty. The wage earner died of natural causes, rather than from bodily injuries received through violent, external, and accidental means. Mrs. Salfi does not qualify as the wage earner's widow and cannot become entitled to mother's insurance benefits.

Since Mrs. Salfi was married to the wage earner less than nine months before he died, her daughter, Doreen, was a stepchild for less than nine months. Although she was a stepchild for more than three months, the wage earner's death was neither accidental nor in the line of duty. Doreen cannot, therefore, qualify as the wage

earner's stepchild and is not entitled to child's insurance benefits. The initial determination is affirmed.

Chief, Reconsideration Branch

September 5, 1973
Date

cc: Lorna Siepser, Attorney
2221 Broadway
Redwood City, California 94063

EXHIBIT "E"

AFFIDAVIT OF CONCETTA SALFI

I, CONCETTA SAIFL, being duly sworn, hereby make affidavit to the following:

I married LONDO SALFI on May 27, 1972. We had known each other for over a year prior to that time, and had courted continuously for approximately one year prior to our marriage. We often went dancing at various clubs such as the Moose Club and the American Legion Hall. Shortly after the first of the year, 1972, we decided to marry, and announced this to our family and friends.

During the time that I knew Londo Salfi, he appeared to be in sound health, and there was no indication whatsoever that he had any heart problems. In fact, it was a standing joke between us that he was taking on a liability, in that I have been classified as totally disabled by the Social Security Administration, as a result of a heart condition. Londo and I entered into our marriage with the full expectation that we would spend the rest of our lives together, and our marriage was based upon love, not upon any expectation of receiving survivor's benefits. At no time prior to June 13, 1972 did either my husband or I have any inkling whatsoever that he had a heart condition. In fact, until the condition was diagnosed, we both assumed that it was merely indigestion.

I make this affidavit upon my best information and belief, and with the full knowledge that it is the complete truth, so far as I know.

/s/ Concetta Salfi
CONCETTA SALFI

Subscribed and sworn to before me this October 18, 1973.

/s/ Mary Hannah
Notary Public

[OFFICIAL SEAL]

Mary Hannah, Notary Public—California, Principal Office in San Mateo County. My Commission expires September 28, 1967.

[Filed November 19, 1973]

NOTIFICATION AND CERTIFICATION

TO: THE HONORABLE RICHARD H. CHAMBERS, CHIEF JUDGE, COURT OF APPEALS, NINTH CIRCUIT.

Pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284 you are notified that the complaint now pending in the above entitled cause challenges the constitutionality of one or more sections of the Social Security Act, as amended, 42 U.S.C. §§ 401 et seq.

I certify that I have examined the complaint and that, in my opinion, this challenge requires the formation of a District Court of three judges, composed as designated in § 2284.

Dated: November 19, 1973.

/s/ Albert C. Wollenberg
United States District Judge

[Filed November 27, 1973]

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO APPLICABLE STATUTES, UNITED STATES CODE

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of the applicable statutes, United States Code, do hereby designate and appoint the

HONORABLE OLIVER D. HAMLIN,

United States Circuit Judge for the Ninth Circuit; and the

HONORABLE ALBERT C. WOLLENBERG,

United States District Judge for the Northern District of California; and the

HONORABLE WILLIAM G. EAST,

United States District Judge for the District of Oregon, to hold district court for the Northern District of California at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

CONCETTA SALFI, et al., Plaintiffs, v. CASPAR WEINBERGER, in his capacity as Secretary of the Department of Health, Education and Welfare; et al., Defendants.
No. C-73 1863 ACW

and all motions and proceedings therein.

DATED: November 23, 1973.

/s/ Richard H. Chambers
Chief Judge, Ninth Circuit

cc: Judge Hamlin
Judge Wollenberg
Judge East
Clerk, NCal.
Clerk, Ore.
Clerk, 9th Cir.

[Filed December 17, 1973]

MOTION FOR PRELIMINARY INJUNCTION

Come now Plaintiffs, Concetta Salfi and Doreen A. Kalnins, and move the court for a preliminary injunction in the above-entitled case enjoining and restraining defendants, CASPAR WEINBERGER, in his capacity as Secretary of the Department of Health, Education and Welfare; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E. C. DeBACA, in his capacity as Director of Region Nine of United States Department of Health, Education and Welfare; JOHN F. RICHARDSON, in his official capacity as Commissioner for Region Nine of the Social Security Administration; and SOCIAL SECURITY ADMINISTRATION; their agents, servants, employees and attorneys, from denying plaintiffs and the class they represent, widows' and children's benefits to which they are entitled under the Social Security Act, simply because the duration of the marriage to the deceased wage-earner was less than the nine months required in 42 U.S.C. § 416(c)(5) and (e)(2) and ordering defendants to provide benefits, or an opportunity for a hearing on the genuineness of their status, to plaintiffs and all those similarly situated, and further move that the trial of this action on the merits be advanced and consolidated with the hearing of this motion for preliminary injunction.

The grounds in support of this motion are as follows:

1. Although phrased as a definition of eligibility, the challenged statutes represent a conclusive presumption violative of the Due Process Clause of the Fifth Amendment.

2. The presumption here challenged is neither the best nor the only means of excluding fraudulent applications and the use of such presumption constitutes an overbroad classification which arbitrarily and unequally denies benefits to plaintiffs and their class while granting them to others whose situations are not meaningfully distinguishable.

Unless restrained, defendants will continue to deny plaintiffs and their class benefits to which they are otherwise entitled, based upon the challenged statutes.

Immediate and irreparable injury, loss and damage will result to plaintiffs and their class by reason of the continued denial by defendants, as more particularly appears in the verified complaint filed herein. Plaintiffs have no adequate remedy at law.

If this preliminary injunction be granted, the injury, if any, to defendant herein, if the final judgment be in their favor, will be inconsequential.

Dated: 12/13/73

/s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs
2221 Broadway
Redwood City, CA 94063

PROOF OF SERVICE

I hereby certify that on the 14th day of December, 1973, I served a copy of the attached Motion for a Preliminary Injunction upon the Attorneys for Defendants by depositing said copy in the U.S. mail, postage prepaid, addressed to:

U.S. Attorney's Office
Federal Building
450 Golden Gate Ave.
San Francisco, CA 94102

/s/ Jennie R. Giannini
Jennie R. Giannini

[Filed February 7, 1974]

STIPULATION FOR SHORTENING TIME FOR NOTICE OF MOTION AND TO HAVE CASE HEARD UPON CROSS-MOTIONS FOR SUMMARY JUDGMENT

IT IS HEREBY STIPULATED, subject to the approval of the Court, by and between plaintiffs and defendants, through and by their respective counsel, as follows:

1. The 21 day time period for noticing motions imposed by Local Rule 114(b) be and hereby is shortened, in order to allow plaintiffs' Motion for Summary Judgment, plaintiffs' Motion to Consolidate the Hearing on Preliminary and Permanent Injunctive Relief, defendants' Cross-motion for Summary Judgment, and defendants' Motion to Dismiss to be heard on February 20, 1974, at 2:00 P.M., the time set for hearing upon plaintiffs' Motion for Preliminary Injunction;

2. There are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision of 42 U.S.C. § 416, and that this three-judge panel may finally determine the constitutionality of said challenged provisions on the basis of the facts set out in the complaint and affidavits heretofore filed;

3. Trial on the issue of the permanent injunction against the enforcement of the challenged provisions of 42 U.S.C. § 416 may be consolidated with and in the pending hearing re preliminary injunction. Thereafter, all questions not relating to the injunction against the enforcement of the challenged provisions may be referred to the convening judge for determination.

Dated: February 5, 1974.

Respectfully submitted,

PLAINTIFFS

By: /s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs

Dated: February 7, 1974.

DEFENDANTS

By: /s/ Howard Chang
HOWARD CHANG
Attorney for Defendants

[Filed February 11, 1974]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

This Motion is based upon:

(a) Plaintiffs' complaint and the Exhibits attached thereto, including Plaintiff Concetta Salfi's Affidavit;

(b) Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction.

(c) Stipulation for Shortening Time for Notice of Motion and to Have Case Heard Upon Cross-Motions for Summary Judgment.

Dated: February 7, 1974.

/s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs

(PROOF OF SERVICE BY MAIL—1013,a 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the county of Santa Clara I am over the age of eighteen and not a party to the within above entitled action: my business address is: 2221 Broadway, Redwood City, CA. On February 7, 1974, I served the within Plaintiffs' Motion to Consolidate Hearing on Preliminary Inj. With Trial on the Merits and Plaintiffs' Motion for Preliminary Injunction on the defendants' attorney in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Redwood City CA addressed as follows:

Howard Chang
U.S. Attorney's Office
450 Golden Gate Avenue
San Francisco, CA 94102

I, LESLIE ROBINSON, certify (or declare), under penalty of perjury,* that the foregoing is true and correct. Executed on February 7, 1974 at Redwood City, California.

/s/ Leslie Robinson

* Proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

[Filed February 11, 1974]

PLAINTIFFS' MOTION TO CONSOLIDATE HEARING ON PRELIMINARY INJUNCTION WITH TRIAL ON THE MERITS

Plaintiffs hereby move the Court as follows:

1. That, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, it consolidate the hearing on Plaintiffs' Motion for Preliminary Injunction with a trial on the merits at the date and time scheduled for said hearing, to wit, February 20, 1974, at 2:00 p.m.; for the reason that, since there is no genuine issue of material fact, this matter may and ought to be determined finally upon the merits.

Dated: February 7, 1974.

/s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs

[Filed February 11, 1974]

NOTICE AND MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

PROPOSED ORDER

NOTICE AND MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

To the plaintiffs and their attorneys:

BRUCE N. BERWALD
DON B. KATES, JR.
CARL L. McCONNELL
San Mateo County Legal Aid Society
2221 Broadway Street
Redwood City, California 94063

FRED H. ALTSHULER
JOHN GANT
GRLA—Cooperative Legal Services Center
1212 Market Street
San Francisco, California 94102

ALBERT H. MEYERHOGG
ELAINE D. CLIMPSON
California Rural Legal Assistance
1212 "F" Street
Marysville, California 95901

PLEASE TAKE NOTICE that on Wednesday, February 20, 1974, at 2:00 p.m., the date presently scheduled for the hearing on plaintiffs' motion for preliminary injunction and summary judgment, or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendants will move the Court before the Honorable Judges James R. Browning, William G. East and Albert C. Wollenberg, in Courtroom No. 7, 19th Floor, United States Court House and Federal Building, 450 Golden Gate Avenue, San Francisco, California, to dismiss the Complaint and action or, in the alternative, for summary judgment in favor of the defendants.

This motion is made pursuant to Rules 12(b)(1), 12(b)(6) and 56 of the Federal Rules of Civil Procedure, and is based upon the present notice, the memorandum in opposition to plaintiffs' motion for preliminary injunction, filed on January 29, 1974, and the affidavit attached thereto, the Stipulation Shortening Time, and on such further grounds as may be offered at the hearing on this motion.

An appropriate form of order is submitted herewith in compliance with Local Rule 114(d).

Dated: February 11, 1974.

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ Howard T. Chang
HOWARD T. CHANG
Assistant United States Attorney
Civil Division

Attorneys for Defendants

[Filed April 23, 1974]

NOTICE AND MOTION FOR STAY OF ENFORCEMENT OF JUDGMENT AND RECONSIDERATION OF JUDGMENT

POINTS AND AUTHORITIES
AFFIDAVIT

PROPOSED ORDERS

NOTICE AND MOTION FOR SUSPENSION AND STAY OF INJUNCTION

To the plaintiffs and their respective attorneys as indicated on the attached Certificate of Service by Mail:

PLEASE TAKE NOTICE that on ———— at ————, as scheduled by the Court, the undersigned attorneys for the defendants will move the Court before the Honorable James R. Browning, William G. East and Albert C. Wollenberg, Judges, in the United States Court House, Court Room No. 7, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, to stay the enforcement of the judgment entered April 16, 1974, pending appeal and for reconsideration of said judgment.

These motions are made pursuant to Rules 62 and 59 of the Federal Rules of Civil Procedure and are based upon the present notice, the attached memorandum of points and authorities and affidavit, the pleading filed heretofore in this action and any additional grounds presented at the hearing on these motions.

The defendants request that a stay of enforcement of judgment be granted pending the expiration of the 30-day period for direct appeal to the United States Supreme Court, pursuant to 28 U.S.C. § 1252 and 1253, and in the event that appeal is sought by the defendants for the duration of such appeal proceedings. The reasons for granting a stay of judgment are as follows:

(1) The likelihood of the defendants prevailing on the merits on appeal;

(2) Irreparable injury will result to the defendants unless the stay is granted;
(3) No substantial harm will result to other interested persons; and
(d) The public interest is in favor of the defendants.

The motion for reconsideration should be granted and an Order dismissing the Complaint and action or, in the alternative, granting summary judgment in favor of the defendants should be issued on the following grounds:

(1) Jurisdiction under 28 U.S.C. § 1331 is lacking;
(2) No Determinative Facts Are Presumed by 42 U.S.C. §§ 416(c)(5) and (e)(2);
(3) The burden of identifying and providing notice to all members of the Class is improperly imposed on the defendants; and
(4) The granting of benefits retroactively is barred by sovereign immunity.

An Appropriate form of Order is attached hereto in compliance with Local Rule 114(d).

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ Howard T. Chang
HOWARD T. CHANG
Assistant United States Attorney

Attorneys for Defendants

SUPREME COURT OF [redacted] The United States

No. A-1211

ORDER

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the judgment of the United States District Court for the Northern District of California in case No. 73-1863 ACW be, and the same is hereby stayed only to the extent that it orders sending notice and payment of benefits to members of the class from the date of original entitlement pending reconsideration of the application when the memorandum of appellees is received.

IT IS FURTHER ORDERED that benefits be paid to the named appellees in accordance with the order of the United States District Court.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 21st day of June, 1974.

A true copy MICHAEL RODAK, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ Francis J. Lawson
Deputy

SUPREME COURT OF THE UNITED STATES

No. 74-214

CASPAR WEINBERGER, Secretary of Health, Education and Welfare et al., APPELLANTS

v.

CONCETTA SALFI et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 11, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 565837 95

RECEIVED
SEP 30 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CASPAR WEINBERGER, et al., Appellants, vs. CONCETTA SALFI, et al., Appellees.	NO. 74-214

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Appellee, CONCETTA SALFI, asks leave of the Court to proceed in forma pauperis pursuant to Rule 53 of the Supreme Court Rules [U.S.C. Title 28] and to file all motions, briefs, and documents in accordance with Rule 47 of said rules.

Appellee's affidavit in support of this motion is attached hereto.

DATED: September 19, 1974.

BRUCE N. BERWALD
DON B. KATES, JR.
Attorneys for Appellees
2221 Broadway
Redwood City, CA 94063

Telephone: (415) 365-8411

AFFIDAVIT OF SERVICE BY MAIL

I, Jeanne Pritchard, certify that I am a citizen of the United States, over the age of 18 years, and not a party to the within action, nor an attorney of record. My place of employment and business address is 1212 Market Street, San Francisco, California 94102.

I served a true copy of the attached MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS on the Appellant herein by placing a true copy thereof in an envelope addressed as follows:

ROBERT H. BORK, Solicitor General
CARLA A. HILLS, Assistant Attorney General
WILLIAM L. PATTON, Assistant to the Solicitor General
JOHN K. VILLA, Esq.
WILLIAM KANTER, Esq.
Department of Justice
Washington, D.C. 20530

Said service is in compliance with paragraphs 1 and 3 of the Supreme Court Rule 23. All parties required to be served have been served.

DATED: September 27, 1974.

Jeanne Pritchard
JEANNE PRITCHARD

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CASPAR WEINBERGER, et al., Appellants, vs. CONCETTA SALFI, et al., Appellees.	NO. 74-214

AFFIDAVIT OF APPELLEE
CONCETTA SALFI

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN MATEO)

I, CONCETTA SALFI, being first duly sworn, according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Appellee in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of printing documents in accordance with Rule 39 of the Supreme Court Rules or to pay any other costs which might be required.

3. I am unable to give security for the same.

4. I believe that I am entitled to the relief granted me by the judgment of the United States District Court, Northern District of California; and I am requesting that this Court affirm said judgment.

5. My sole sources of income are Social Security benefits, child support and Aid to the Totally Disabled.

6. The nature of my cause is briefly stated as follows:

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//

42 U.S.C. §416(c) and (e) operate as conclusive evidentiary presumptions disqualifying me from receipt of Social Security's Survivor's benefits, in violation of my right to Due Process embodied in the Fifth Amendment to the United States Constitution.

Executed this 26th day of September, 1974.

Concetta Salfi
CONCETTA SALFI

SUBSCRIBED and sworn to before me this 26th day of September, 1974.

Eldred J. Taylor
NOTARY PUBLIC

ELDRED J. TAYLOR
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
SAN MATEO COUNTY
My Commission Expires January 2, 1976

73-214

OCT 2 1974

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

On Appeal From The United States District Court
For The Northern District Of California

MOTION TO AFFIRM AND/OR DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

CONSTITUTIONAL ARGUMENT 6

SOVEREIGN IMMUNITY 11

I. SOVEREIGN IMMUNITY DOCTRINE WAS INAPPLICABLE SINCE THE SUIT WAS AGAINST FEDERAL OFFICERS TO ENJOIN AND REDRESS UNCONSTITUTIONAL ACTIONS 11

II. IF SOVEREIGN IMMUNITY BARS SUITS TO REDRESS THE ENFORCEMENT OF UNCONSTITUTIONAL LAWS THIS COURT SHOULD HEAR ARGUMENT AS TO THE POSSIBILITY OF ABANDONING THE SOVEREIGN IMMUNITY DOCTRINE 15

III. THE SOVEREIGN IMMUNITY ASPECT OF THE APPEAL SHOULD BE DISMISSED SINCE REVERSAL ON THAT GROUND WOULD BE A VAIN AND PRODIGAL ACT WHICH WOULD RESULT ONLY IN THE UNNECESSARY FILING OF DUPLICATIVE LITIGATION TO INEVITABLY REACH THE RESULT ORDERED BELOW 18

IV. SECTION 405(g)'S WAIVER OF SOVEREIGN IMMUNITY SHOULD BE HELD TO AUTHORIZE THE JUDGMENT BELOW WITHOUT NECESSITY OF EXHAUSING AN ADMINISTRATIVE REMEDY WHICH WAS FUTILE AND TO WHICH THE CLASS WAS DENIED ACCESS BY SSA 20

V. AT LEAST WHERE THE ADMINISTRATIVE REMEDY IS FUTILE OR REFUSED, § 405(g)'S WAIVER OF SOVEREIGN IMMUNITY AS TO SUITS FOR SOCIAL SECURITY BENEFITS ALLOWS SUIT UNDER OTHER APPLICABLE STATUTES SUCH AS 28 U.S.C. 1331 AND 1361 AND THE ADMINISTRATIVE PROCEDURE ACT . . 22

VI. THE DECREE BELOW SHOULD BE UPHELD AS EFFECTUATING SSA'S OWN REGULATIONS WHICH REQUIRE RETROACTIVE BENEFITS WHERE AN APPLICATION WAS ORIGINALLY DENIED DUE TO AGENCY ERROR OR OTHER INADVERTANCE 25

VII. THE DECREE BELOW DOES NO MORE THAN EFFECTUATE THE DUE PROCESS CLAUSE UNDER WHICH THE SALTIS AND THOSE SIMILARLY SITUATED WERE ALWAYS ENTITLED TO HAVE THEIR APPLICATIONS CONSIDERED WITHOUT REFERENCE TO THE INVALIDATED CONCLUSIVE PRESUMPTION 25

Page

VIII. THIS IS A SUIT AGAINST OFFICERS OF THE UNITED STATES FOR WHICH CONGRESS HAS SPECIFICALLY PROVIDED BY LAW AND THUS NOT AN UNCONSENTED SUIT AGAINST THE UNITED STATES ITSELF 26

IX. A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR ITS IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL 28

CLASS ACTION 29

CONCLUSION 35

TABLE OF AUTHORITIES CITED

CASES	Page
Arkansas Education Assn. v. Board of Education 446 F.2d 763 (8 Cir. 1971)	33
Bell v. Burson 402 U.S. 535 (1971)	10
Bing v. Roadway Express, Inc. 485 F.2d 441 (5 Cir. 1973)	33,35
Bivens v. Six Unknown Federal Narcotics Agents 403 U.S. 388 (1971)	26,27
Bolling v. Sharpe 347 U.S. 497 (1954)	7
Brooks v. Dewar 313 U.S. 354 (1941)	13
Brown v. Allen 344 U.S. 443 (1953)	17,20
Chisolm v. Georgia 2 U.S. (2 Dall.) 419 (1793)	13
City of Kenosha v. Bruce 412 U.S. 507 (1973)	27
Commonwealth of Pennsylvania v. Lynn 362 F.Supp. 1363 (D. D.C. 1973)	28
Conley v. Gibson 355 U.S. 41 (1957)	20
Constructores Civiles de Centroamerica v. Hannah 459 F.2d 1385 (D.C. Cir. 1972)	27
Department of Agriculture v. Moreno 413 U.S. 528 (1973)	12
Department of Agriculture v. Murry 413 U.S. 508 (1973)	6,10,11,12
Diaz v. Weinberger 361 F.Supp. 1 (S.D. Fla. 1973)	20
Dudley v. Southeastern Factor & Finance Co. 57 F.R.D. 177 (N.D. Ga. 1972)	31
Dunn v. Blumstein 405 U.S. 330 (1972)	6
Edelman v. Jordan No. 72-1410 (March 25, 1974)	13,14,26
Eisen & Carlysle v. Jacqueline No. 73-203 (May 28, 1974)	30,31,32,33,34

	Page
Estrada v. Ahrens 296 F.2d 690 (2 Cir. 1961)	27
Griffin v. Richardson 346 F.Supp. 1226, aff'd 409 U.S. 1069 (1972)	12,24,32
Hagans v. Lavine 415 U.S. 528 (1974)	24
Hammond v. Powell 462 F.2d 1053 (4 Cir. 1972)	33
Heiner v. Donnan 285 U.S. 312 (1932)	10,11
Honda v. Clark 386 U.S. 484 (1967)	23
Hurn v. Oursler 289 U.S. 238 (1933)	24
Jimenez v. Weinberger No. 72-6609, 94 S.Ct. 2496 (1974)	16,19,32
Johnson v. Robison 415 U.S. 361 (1974)	20,23
Johnson v. United States 318 U.S. 198 (1943)	35
Kansas v. United States 204 U.S. 33 (1907)	12
Katz v. Carte Blanche Corp. 53 F.R.D. 539 (W.D. Penn. 1971)	31
Keifer v. Reconstruction Finance Corp. 306 U.S. 375 (1939)	19,22
Kendall v. United States 37 U.S. (12 Pet.) 621 (1838)	23
Kingsbrook Jewish Medical Center v. Richardson 486 F.2d 663 (2 Cir. 1973)	27
Kletscha v. Driver 411 F.2d 436 (2 Cir. 1969)	27
Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682 (1949)	11,12,29
Littell v. Morton 445 F.2d 1207 (4 Cir. 1971)	12,28.32
Local 2677, AFGE v. Phillips 358 F.Supp. 60 (D. D.C. 1973)	29
Lynch v. Household Finance Co. 360 F.Supp. 720 (D. Conn. 1973)	32
Malone v. Bowdoin 369 U.S. 643 (1962)	13

Page

McKart v. United States
395 U.S. 185 (1969) 22,23

McNeese v. Board of Education
373 U.S. 668 (1963) 14

Miguel v. McCarl
291 U.S. 442 (1934) 9,25

Miller v. School District No. 2
256 F.Supp. 370 (D. S.C. 1966) 30

Mobil, J. & K. C. Ry. v. Turnipseed
219 U.S. 35 (1911) 7

Morrissey v. Brewer
408 U.S. 471 (1972) 33

Morton v. Ruiz
415 U.S. 199 (1974) 12,29,32

Mulry v. Driver
366 F.2d 544 (9 Cir. 1966) 27

National City Bank v. Republic of China
348 U.S. 356 (1955) 18,22

Oestereich v. Selective Service Board
393 U.S. 233 (1969) 23

Parisi v. Davidson
405 U.S. 34 (1972) 22,23

Reed v. Arlington Hotel Co., Inc.
476 F.2d 721 (8 Cir. 1973) 30

Rickert Rice Mills v. Fontenot
297 U.S. 110 (1936) 12

Roberts v. United States ex rel. Valentine
176 U.S. 221 (1900) 12,28

Robinson v. Lorillard Corp.
444 F.2d 791 (4 Cir. 1971) 33

Rockbridge v. Lincoln
449 F.2d 567 (9 Cir. 1971) 29

Scanwell Laboratories, Inc. v. Shaffer
424 F.2d 859 (D.C. Cir. 1970) 27

Scheuer v. Rhodes
Nos. 72-914 and 72-1318 (Dec. 4, 1973) 20

Schlesinger v. Wisconsin
270 U.S. 230 (1926) 7

Stanley v. Illinois
405 U.S. 645 (1972) 6,7

State Highway Commission v. Volpe
479 F.2d 1099 (8 Cir. 1973) 29

Page

State of Ohio v. Helvering
292 U.S. 360 (1934) 12

State of Washington v. Udall
417 F.2d 1310 (1969) 12

Stell v. Savannah-Chattman Board of Education
333 F.2d 55 (5 Cir. 1964) 30

Turner v. Kings River Conservation District
360 F.2d 184 (1966) 9

United Mine Workers v. Gibbs
383 U.S. 822 (1966) 24

United States v. Caltex, Inc.
344 U.S. 149 (1953) 33

United States v. Jefferson County Board of Education
380 F.2d 385 (5 Cir. 1967) 30

Vlandis v. Kline
412 U.S. 441 (1973) 6,8,10,11

Wilwording v. Swenson
404 U.S. 249 (1971) 20

Yaffe v. Powers
454 F.2d 1362 (1 Cir. 1972) 33

Ex parte Young
209 U.S. 123 (1908) 14

STATUTES AND REGULATIONS

20 C.F.R. § 404.957 25

Administrative Procedure Act,
5 U.S.C. §§ 702, et seq. 24

28 U.S.C. § 1331 22,24,26

§ 1343 4,26

§ 1361 4,22,24,26,28

42 U.S.C. § 405(g) 4,18,19,20,22,23

§ 416 10

§ 1983 27

§ 1985 26,27

F.R. Civ. P., Rule 23(b)(2) 1,2,4,5,29,30,31,32,33,34,35

Rule 23(b)(3) 4,31,32,34

	Page
F. R. Civ. P., Rule 23(c)(2)	2,4,30,31
Rule 23(c)(3)	30

LEGISLATIVE HISTORY

House Ways & Means Committee Report, 3 U.S. Cong. News and Admin. Reports, 5042 (1972)	6
Senate Finance Committee Report, 2 U.S. Cong. News and Admin. Reports, 2933 (1967)	6
Proposed Rules of Civil Procedure, 39 F.R.D. 98 (1965)	32

ADMINISTRATIVE DECISION

In the Case of Lillian Daniels, November 14, 1973	21

COMMENTARIES

Block, Suits Against Government Officers, 59 Harv. L. Rev. 1060	13,17
Borchard, Government Liability in Tort, 34 Yale L. J. 1	17
Byse, Proposed Reforms in Federal Non-Statutory Judicial Review, 75 Harv. L. Rev. 1479	17,18
Crampton, Non-Statutory Review of Federal Administrative Action, 68 Mich. L. Rev. 387	17
Davis, Administrative Law Treatise	13,14,15,16
Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39	34
Harper & James, 2 Law of Torts 1609	17
Jaffe, Judicial Control of Administrative Action	12,17
Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1	12
Mikva, Sovereign Immunity: In A Democracy the Emperor Has No Clothes, 1966 U. Ill. L. For. 828	17
Roady, Lee, Land, Larson and Malone -- Sovereign Immunity Revisited, 43 Tex. L. Rev. 1062	14
Scalia, Sovereign Immunity and Non-Statutory Review of Federal Administrative Action, 68 Mich. L. Rev. 867	16,17
Steadman, Forgive U.S. its Trespasses? - Land Title Disputes With the Sovereign, 1972 Duke L. J. 15	17,18
Wall & Childers, The Law of Restitution and the Federal Government, 66 Nw. L. Rev. 587	17

STATEMENT OF FACTS

As Appellants'[1] Jurisdictional Statement notes, the facts are not in dispute. Appellees[2] can therefore adopt SSA's statement of facts, except for one highly misleading implication. SSA alleges that the District Court took no action with respect to the class until it granted the Salfi family's motion for summary judgment,[3] and, again, that the District Court "deferred" action on the class until it decided the merits.[4] A more accurate description would be that the District Court certified the class immediately after its earliest hearing in the case, which -- because of SSA's litigation strategy -- happened to be the hearing on the merits.

Due to various delays in scheduling the sitting of the three-judge panel, the Salfi family's motion for preliminary injunction could not be heard until after SSA's answer was due. In lieu of answering, SSA stipulated to the allegations of the Complaint, including the (b)(2) class action allegations. In the same stipulation the parties waived time limitations so that cross-motions for summary judgment and a motion to dismiss could be heard with the motion for preliminary injunction. It was further agreed that this combined hearing would constitute the trial on all issues. Thus the certification hearing was implicit in the combined motions hearing and trial although neither party

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[1] Appellants consist of various officials of the Social Security Administration (SSA) and of the Department of Health, Education and Welfare of which SSA is a sub-agency. Hereinafter appellants will jointly be denominated SSA.

[2] Appellees consist of Mrs. Concetta Salfi and her daughter Dorothy A. Kalnins, respectively the widow and step-child of the deceased wage earner, Londo L. Salfi. Hereinafter appellees will jointly be denominated the Salfi family.

[3] Jurisdictional Statement, p. 5.

[4] Jurisdictional Statement, p. 14, n.10.

ever addressed the class issue. Thereafter the court certified the class as part of the order in which it disposed of all of the issues in the case. A class action issue was first explicitly raised approximately six weeks later when SSA objected to a provision of the order and final judgment which it viewed as requiring it to bear the cost of Eisen-type notice.[5/] Neither then nor in this Court has SSA ever objected to the appropriateness of a class action, definition of the class, representative nature of the parties' plaintiff or any other issue which is normally contemplated in a certification hearing.

5/ As will be discussed in some detail infra, the court never ordered Eisen-type notice of the pendency of the action since this is a Rule 23(b)(2) action rather than a (b)(3) action as to which Rule 23(c)(2), of which Eisen is an interpretation, requires such pre-judgment notice. The notice to which SSA objects is not a Rule 23 notice at all, but rather a notice to those previously denied benefits on the grounds of the invalidated provisions that they may reapply to SSA and will receive benefits if found otherwise eligible. Such notice, of course, is regularly required in equitable decrees where necessary to correct the effects of previous erroneous conduct by the defendants. See e.g., United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) requiring notice to Black students that they may enter previously all White schools pursuant to court ordered desistance from segregated schooling.

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SUMMARY OF ARGUMENT

Constitutional Issue. The statutory provisions invalidated below substituted a conclusive presumption for appellees' right to prove the salient facts establishing their eligibility. Conclusive presumptions violate the Fifth Amendment unless they are of a matter that is invariably true. The conclusive presumption invalidated below is neither of a matter which is invariably true, nor of a matter which is impossible (or even difficult) of determination through Social Security Administration factual investigation. Cases limiting the scope of the equal protection doctrine in the social welfare area have no application to the conclusive presumption doctrine which is based upon requirements of procedural due process and not upon equality.

Sovereign Immunity. Appellants' argument that appellees have erroneously proceeded under a statute which does not waive sovereign immunity rather than under another available statute which does should be dismissed as not meriting the attention of this Court. The government suffered no harm from this asserted error which is de minimus and a decision for appellants on this ground would be devoid of any practical effect -- virtually an advisory opinion.

If sovereign immunity be deemed to bar the judgment below, the Court should allow full briefing and argument on the question of whether it ought to repudiate the doctrine of sovereign immunity which, in the unanimous views of legal scholars and the legal profession in general, is an anachronistic injustice which serves no purpose in modern law.

Even without repudiating the doctrine of sovereign immunity, the judgment below may be upheld on any of the following grounds: (a) that it is not against the United States because it requires only that federal officers administer the Social Security program in consonance with the federal Constitution; (b) that it is not

against the United States because no damages or benefits are directly involved, for it only requires that applications originally disallowed on an unconstitutional basis be re-examined; (c) that it is not barred by sovereign immunity insofar as it would result only in effectuation of Social Security Administration regulations governing payment of back paymehts where applications were originally erroneously denied; (d) that it is not against the United States because all expenditures would come out of the extant Social Security Trust Fund; (e) that sovereign immunity as to suits for Social Security benefits has been waived by 42 U.S.C. § 405(g) upon which the decree implicitly rests -- and/or that this waiver allows identical relief under other sources of jurisdiction upon which the judgment rests; (f) that 28 U.S.C. 1343, 1361, and the Administrative Procedure Act constitute waivers of sovereign immunity; and (g) that sovereign immunity does not bar suits the jurisdiction and cause of action as to which arise directly out of the Fifth Amendment.

Class Action. Appellants were not ordered to provide pre-judgment notice of the pendency of the action, but post-judgment notices of their right to reapply to all those previously denied benefits. Such notice does not relate to the requirements of Rule 23, but rather is of the kind commonly decreed where necessary to correct previous wide-spread wrongful or erroneous conduct of a defendant. Even if the notice to which appellants object were a prejudgment Rule 23(c)(2) notice of pendency of action, appellants would properly be required to pay for it since as losing parties they are responsible for the costs. Since this lawsuit was one brought predominantly for injunctive or declaratory relief, it proceeded under Rule 23(b)(2) as to which a pre-judgment notice of pendency of action is not required, rather than upon (b)(3), relating to damage actions, as to which such notice is required. Rule 23, as presently constituted, does not violate due process. As SSA stipulated to the (b)(2) nature of the lawsuit and actively helped to chart the course of litigation below, without voicing any objection on class action grounds, it has waived the making of any such objection.

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ARGUMENT

The Salfi family respectfully urges this Court to affirm the judgment below in all respects. The Salfis further respectfully urge this Court to dismiss the sovereign immunity and class action issues raised by SSA as inappropriate for decision under the facts of this case.

CONSTITUTIONAL ARGUMENT

The Salfi family urges that the Social Security provisions invalidated below create an unconstitutional conclusive presumption that a marriage was entered into in contemplation of a wage earner's death if he dies within the nine months thereafter. SSA, admitting the invalidated provisions to be a conclusive presumption,[1/] attacks the judgment below for ignoring the principles this Court has laid down to govern equal protection challenges to social welfare legislation. This objection is inappropriate since the principles and rationale governing conclusive presumption cases are entirely different from those applicable to equal protection cases.[2/] This Court recognized the repugnance of conclusive presumptions to Fourteenth Amendment procedural due process[3/] some forty years before it held that Fifth Amendment substantive due process might encompass the concept of equal protection which is specifically delineated in the Fourteenth Amendment.[4/] The gravamen of the conclusive presumption doctrine is not inequality, but deprivation of the individual's right to prove his claim by the substitution of a conclusive presumption for that right. As this Court said just last Term, in striking down a presumption that only those who had resided in the state

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1/ The provisions are not specifically phrased as conclusive presumptions. But this Court has identified statutes as conclusive presumptions where the statutory intent was clearly to create an evidentiary rather than substantive rule, and/or where no substantive purpose for the statute could be determined. E.g., Stanley v. Illinois, 405 U.S. 645 (striking down as conclusive presumption statute excluding unmarried fathers from the definition "parents", just as the Salfi family are excluded from the statutory definitions of "widow" and "child"), Department of Agriculture v. Murry, 413 U.S. 508 (striking down as a conclusive presumption exclusion from Food Stamp eligibility of any person claimed as a tax dependent by his parent in the preceding year), Vlandis v. Kline, 412 U.S. 441 (striking down as a conclusive presumption a duration-of-residency requirement for those hoping to escape non-resident college tuition fees), Dunn v. Blumstein, 405 U.S. 330 (striking down a duration requirement for voting as a conclusive presumption that putative voters not meeting it were not bona fide residents).

Following this analysis, appellees would first note that Congress itself has twice described the provisions invalidated below as evidentiary in character, being intended to weed out marriages which were "undertaken to secure benefit rights" as opposed to bona fide marriages. House Report No. 92-231, 96 Cong., 2d Sess. (1972) (quoted in the opinion below at p.5A of the Jurisdictional Statement) and the Report of the Senate Finance Committee which accompanied the passage of the challenged provisions in 1968. See 1967 U.S. Cong. News and Admin. Rep., V.2, p. 2953. Secondly, on this appeal, SSA does not suggest any substantive, non-evidentiary purpose which the challenged provisions might have been intended to effect. (In the court below SSA suggested that the challenged provisions were intended to exclude marriages in which the wife and step-child had not been economically dependent upon the wage earner, rather than marriages

1/(Cont'd.) entered into fraudulently. This suggestion contravened both the legislative purpose and various other provisions of the Social Security Act. More important, far from proposing a substantive purpose in order to show that these provisions were not a conclusive presumption, this suggestion merely redefined them as conclusively presuming a different set of evidentiary facts. And a nine-month post-marital conclusive presumption of economic dependency is not invariably -- or even in the majority of cases -- true, as is demonstrated in greater detail in the Salfi family's memorandum of points and authorities in support of motion for summary judgment in the court below. That court did not even deign to mention SSA's alternative explanation of the conclusive presumption and SSA has not raised it again here.)

2/ The Salfi family did offer an equal protection argument, but only in the sense of Stanley v. Illinois, 405 U.S. 645, i.e., that a conclusive presumption is so arbitrary and unreasonable as to be per se an unjustifiable invidious discrimination against those persons affected by it viz a vis those not so affected.

3/ See e.g., Schlesinger v. Wisconsin, 270 U.S. 230, 240, citing Mobile, J. & K. C. Ry. v. Turnipseed, 219 U.S. 35, 44 ("If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.")

4/ Bolling v. Sharpe, 347 U.S. 497 (1954).

for a year were bona fide residents for state college tuition purposes:

> "[Connecticut is forbidden to make] a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the state allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates. Since § 126 [the Connecticut statute involved] precluded the appellees from ever rebutting the presumption that they were non-residents of Connecticut, that statute operated to deprive them of a significant amount of their money without due process of law."

Vlandis v. Kline, 412 U.S. 441, 452 (emphasis added).

The arbitrariness and inaccuracy of the conclusive presumption challenged by the Salfi family is illustrated by its effect upon them. SSA stipulated below to the following facts concerning the marriage and death of Mr. Salfi:

> "that Mr. Salfi's death from heart failure was entirely unexpected and unforseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of the marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarily determined) of another 21 years of life; that plaintiff [Mrs. Salfi] and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together."[5/]

Nevertheless, the challenged provisions substitute for the opportunity to prove these facts a conclusive presumption that the marriage was somehow entered into fraudulently for the purpose of qualifying the Salfi family for benefits after Mr. Salfi's anticipated early death. Of course some of the applications for benefits excluded by such a presumption will be from persons who married fraudulently in the expectation of their spouse's death.[6/] But the arbitrariness of that presumption is demonstrated by the fact that on the same grounds it excludes applications from legitimately married persons whose spouses died within nine months and fails to exclude the fraudulently married where the spouse died after nine months. Thus this conclusive presumption is fully as irrational as a conclusive presumption excluding persons from the definition of residents of a state because they have not maintained a legal address there for at least a year before

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[5/] Complaint, paragraph 11.

[6/] It should be noted that SSA failed to introduce any evidence that any fraudulent marriage for this purpose has ever occurred or to refer to any hearings or testimony upon which Congress might have based conclusions as to the incidence of such marriages. Similarly, SSA neglected to even attempt to validate the presumption by showing that more fraudulent marriage applications would be excluded than applications from legitimately married applicants; or showing how many fraudulent marriages are not excluded by the presumption because the expected death of the spouse occurs more than nine months after marriage.

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entering college (Vlandis v. Kline, supra), or that persons who had been supported by others in the preceding year were still receiving private charity so as to disqualify them for Food Stamps (Department of Agriculture v. Murry, supra), or that a gift given within two years of the donor's death was given in expectation thereof (Heiner v. Donnan, 285 U.S. 312 (1932)), or that involvement in an auto accident demonstrates recoverable negligence (Bell v. Burson, 402 U.S. 535 (1971)).

In this Court SSA justifies the provisions invalidated below as avoiding "the expense and administrative burden which would be required by subjective inquiry on a case-by-case basis."[7/] But where the right of citizens to prove their claim is involved, it is precisely such a hearing which is required. As Mr. Justice Stewart said, speaking for this Court in Vlandis v. Kline, supra: "The state's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state's objective is premised." 412 U.S. at 451. Such alternative means are abundantly available here.[8/] Since people generally do not anticipate imminent death except upon medical advice, SSA could easily determine whether the marriage was entered into in expectation of imminent death by merely consulting the deceased's physician. Indeed it could relieve itself of even that administrative burden by imposing a rebuttable presumption

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[7/] Jurisdictional Statement, p.8.

[8/] Indeed Congress could not have thought such a determination impossible to make since, in a slightly different context, it has imposed an affirmative duty upon SSA to make exactly that determination. Where a wage earner dies accidently, or in the course of military service, Title 42 U.S.C. § 416(k) requires SSA to give survivors' benefits unless it "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months ...."

as a result of which, in situations where death occurred within nine months after marriage, the applicant would have to submit evidence from the physician and/or other sources that the wage earner had not married in expectation of death.

Finally, SSA to the contrary notwithstanding, the conclusive presumption doctrine does not turn upon -- indeed it has nothing to do with -- the issue of whether a "fundamental" or specially protected interest is involved in this case. As Murry, Vlandis and Heiner demonstrate, the right to procedural due process applies to all statutory provisions including those concerned with gratuity programs, tax exemptions and education benefits.

SOVEREIGN IMMUNITY

I. SOVEREIGN IMMUNITY DOCTRINE WAS INAPPLICABLE SINCE THE SUIT WAS AGAINST FEDERAL OFFICERS TO ENJOIN AND REDRESS UNCONSTITUTIONAL ACTIONS.

SSA apparently concedes that sovereign immunity does not bar the judgment below insofar as it merely declares the challenged provisions unconstitutional or even enjoins their future enforcement.[9/] But SSA relies upon an ambiguous footnote in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, n.11, which says that relief even against an unconstitutional statute "may" be unavailable if it would require affirmative action or operate against the United States Treasury. This language, which has never been clarified by this Court, has been interpreted by the commentators to mean that sovereign immunity bars constitu-

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[9/] No objection is made to the declaratory relief afforded below and the Jurisdictional Statement flatly admits at p.10, "that sovereign immunity does not bar suit where the officer is acting pursuant to an unconstitutional statute. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 ..." The Questions Presented (p.2) and most of the Jurisdictional Statement object to the lawsuit only "insofar as it seeks retroactive Social Security benefits." On the other hand, p. 12, n.7 of the Jurisdictional Statement appears to question the propriety of the prospective injunctive relief as well.

tional litigation only where the relief sought was so sweeping as to impair the credit or otherwise gravely impede the operation of the federal government.[10] Under this view, the lower court held sovereign immunity inapplicable since the relief sought is identical or substantially similar to that approved by this Court in Morton v. Ruiz, 415 U.S. 199 (1974) (upholding class action to mandate re-examination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation), Griffin v. Richardson, 346 F.Supp. 1226, aff'd 409 U.S. 1069 (declaring unconstitutional provisions of the Social Security Act and ordering retroactive benefits to the class), Department of Agriculture v. Murry, supra (declaring statutory restriction on Food Stamp eligibility unconstitutional and mandating payment of benefits to class), and Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (same).

Moreover, even if Larson be read as barring this litigation, it would not be conclusive since this Court granted relief identical or substantially similar to that obtained below in Morton, Griffin, Murry and Moreno, supra, all decided after Larson, as well as in earlier cases.[11] (This Court has several times recognized that its sovereign immunity decisions

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10/ Jaffe, Judicial Control of Administrative Action, 226-227; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 34 (1963). State of Washington v. Udall, 417 F.2d 1310,1318 (1969); Turner v. Kings River Conservation District, 360 F.2d 184, 190 (1966). See also Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971).

11/ Cf. Miguel v. McCarl, 291 U.S. 442, 455 (1934) (mandating payment of retirement or pension benefits illegally withheld), State of Ohio v. Helvering, 292 U.S. 360 (1934) (entertaining, although deciding adversely, state suit to enjoin collection of taxes of the United States -- Kansas v. United States, 204 U.S. 33, holds that federal sovereign immunity applies to suits by states) Higbee Co. v. Willis v. Fentress, 297 U.S. 110 (1936) (enjoining collection of unconstitutional federal tax). See also Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900).

are not easily reconciled,[12] while the leading commentator has said that, "inconsistencies in Supreme Court holdings on sovereign immunity in suits against officers are so flagrant as to make many decisions seem almost capricious.")[13]

SSA seeks to base its sovereign immunity argument upon Edelman v. Jordan, ___ U.S. ___ (1974), a case which does not even mention, much less try to reconcile, Larson and the other cases cited heretofore. Edelman is based upon the Eleventh Amendment, which, although sometimes compared to sovereign immunity, is a far more difficult obstacle to federal jurisdiction. The judiciary having solely created the doctrine of federal sovereign immunity, has unfettered authority to limit, abrogate or abolish it.[14] The Eleventh Amendment, which embodies a "constitutional" right"[15] is not subject to judicial abrogation; indeed it represents a national repudiation of a decision of this Court.[16] The central purpose of the Eleventh Amendment's prohibition of federal judicial jurisdiction over states -- outraged federalism -- is simply inapplicable where federal jurisdiction

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12/ See e.g., Brooks v. Dewar, 313 U.S. 354 (1941) and Malone v. Bowdoin, 369 U.S. 643, 646 (1962).

13/ Davis, Administrative Law Treatise, 546.

14/ Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060, 1081 (1946) "[Confining sovereign immunity to cases] where no substantial claim is made that the officer is acting pursuant to an unconstitutional enactment, or in excess of his statutory authority ... can be accomplished by the courts without the necessity of legislative action. In suits against government officers, the courts have always decided for themselves the question of how and to what extent the doctrine should be applied." The author distinguishes the issue of state government liability which has already been adversely determined by the Eleventh Amendment.

15/ Edelman v. Jordan, supra, U.S. at (1974).

16/ Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) which held that states could be sued by citizens of other states in the federal courts. See analysis in Edelman, supra, U.S. at

is asserted over federal officials.[17] The difference between the Eleventh Amendment and federal sovereign immunity lies essentially in the burden of proof. In Edelman the burden lay upon the citizen to show why a judicially created illogical and fictional distinction between the state officer and the state itself[18] should be expanded in derogation of a specific constitutional command. In this case, however, the burden is upon SSA to show why citizens unconstitutionally deprived of benefits should be denied a judicial forum according to an exception-riddled doctrine for which no one has ever produced a credible, coherent, comprehensive justification[19] and which is based upon more than a score of irreconcilable cases."

17/ On the contrary, as this Court has stated (adopting the language of the lower court): "'We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.'" McNeese v. Board of Education, 373 U.S. 668, 674, n.6 (1963). That reasoning is even more imperative where, as here, the absence of any alternative state jurisdiction means that denial of federal jurisdiction will preclude any judicial protection whatever for the Salfi family's constitutional rights.

18/ Ex parte Young, 209 U.S. 123 (1908). The fictionality of the distinction is frankly admitted by Prof. Davis, 3 Administrative Law Treatise, 545:

> "A plaintiff who wants to compel or to enjoin governmental action often escapes the doctrine of sovereign immunity by suing an officer. The courts are accustomed to indulging in the false pretense that such a suit is not against the government, even though all concerned are fully aware that it is. Confusion often develops because the courts sometimes look to the reality and sometimes look to the pretense. As long as the doctrine of sovereign immunity continues to prevent suits which are really against the government to be brought against the government, what is needed is consistent adherence to the false pretense and rejection of the truth."

19/ Prof. Davis, ibid, at 546-547, refers to "the almost unbelievable lack of specific judicial inquiry into reasons for the basic doctrine"; "the astonishing legal phenomenon that the doctrine of sovereign immunity came into American law without a judicial discussion of its merits and demerits, and [that] recent Supreme Court opinions are characteristically lacking in perspective of the doctrine's overall consequences." --which he (along with quite literally every other commentator) regards as unequivocally pernicious.

II. IF SOVEREIGN IMMUNITY BARS SUITS TO REDRESS THE ENFORCEMENT OF UNCONSTITUTIONAL LAWS THIS COURT SHOULD HEAR ARGUMENT AS TO THE POSSIBILITY OF ABANDONING THE SOVEREIGN IMMUNITY DOCTRINE.

As this brief will in any case be almost burdensomely long, treatment of the numerous sovereign immurity issues has been truncated to little more than outline form. If after reading it, the Court does not find this argumentation sufficient to uphold the judgment below, appellees would most earnestly entreat it not to summarily reverse, but rather to set the matter for full briefing and argument, including possible amici briefs from the various organizations, like the American Bar Association,[20] which have called for the abolition of sovereign immunity. Appellees respectfully urge that if this Court embraces a doctrine which has been unanimously rejected by legal scholars and the profession in general for over fifty years ("No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years;"[21] "Nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go."[22]) it should at least do so in a comprehensive and fully

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20/ Davis, 1970 Supp. Volume at p. 895, states that the ABA House of Delegates in 1970 adopted in principle a proposal of its Administrative Law Section to eliminate legislatively nearly all vestiges of the doctrine and that the ABA is currently sponsoring such a measure in Congress.

21/ Crampton, "Non-statutory Review of Federal Administrative Action," 68 Mich. L. Rev. 387, 419 (1970). Among the authorities quoted by Professor Crampton is Professor Walter Gellhorn: "Today the doctrine may be satisfactory to technicians but not at all to persons whose main concern is with justice ... The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words.", while Milton Carrow is quoted to the effect that the "doctrine of sovereign immunity has long fulfilled the requirements for 'full abandonment.'"

22/ Davis, supra, at 435.

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considered opinion.[23] Such a fully considered opinion would give the Court the opportunity once and for all to lay to rest the familiar assertion that sovereign immunity has no rhyme or reason; that: "The strongest support for sovereign immunity is provided by that four-horse team so often encountered - historical accident, habit, a natural tendency to favor the familiar, and inertia. Nothing else supports sovereign immunity ..."[24] Surely this Court ought not to re-assert that doctrine in a per curiam summary reversal based upon previous cases which the Court itself has characterized as confusing and irreconcilable and which have, in sum, provoked normally unemotional scholars to outraged epithets

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[23] Such a fully considered opinion would negate criticisms such as that of Prof. Scalia, "Sovereign Immunity and Non-Statutory Review of Federal Administrative Action," 68 Mich. L. Rev. 867 (1970):

> "It is the inherited wisdom of the American Bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity. Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth, calling into question not only its utility but even the legitimacy of its alleged origins. Oddly enough, this criticism has had a palpable effect upon federal legislators who, according to our agreed-upon notions of legal process, are supposed to be moved not by learned articles but by lobbies and ballot boxes; it has also had its influence, particularly noticeable in very recent years, upon state supreme courts. But if the United States Supreme Court is to be judged by what it has done concerning the doctrine, as opposed to what it has from time to time said, criticism seems to have confirmed the Court in the error of its ways. Not only has there been no judicial elimination of the doctrine of sovereign immunity as it applies to the federal government, but recently the scope of the doctrine has in some important respects been extended beyond what it was in 1952. [Footnotes omitted.]"

[24] Davis, supra, 1970 Supp., 296.

like: a "blatant affront to the basic precepts of justice" -- "incredible ... to all intelligent observers" -- "judicial arbitrariness at the highest level ..."[25] "capricious denial ... of judicial review of administrative action" -- "abdication of judicial responsibility"[26] -- "illogical, confusing and erratic."[27]

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[25] Scalia, supra, 68 Mich. L. Rev. at 869, 867. See also Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060 (1946): "The consequences [of sovereign immunity cases holding that suits against federal officers are or are not suits against the United States] have not been satisfactory from the standpoint of doctrinal analysis and treatment; and more important, relief has been denied against unconstitutional and unauthorized action on formalistic and technical grounds."

[26] Byse, "Proposed Reforms in Federal 'Non-statutory Judicial Review,'" 75 Harv. L. Rev. 1479, 1491.

[27] Crampton, supra, 68 Mich. L. Rev. at 418. See also Borchard: "Government Liability in Tort," 34 Yale L. J. 1, 2, ("[sovereign immunity] has survived mainly by reason of its antiquity. The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchical countries of Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule that the state is not legally liable for the torts of its officers."), Wall & Childers, "The Law of Restitution and the Federal Government," 66 Nw. L. Rev. 587, n.1 (1971) ("For no apparent reason this immunity was conferred upon the United States Government and has been very slow to disappear."); Harper & James, 2 Law of Torts, 1609 ("Just how an immunity which had its roots in feudalism and in a political philosophy associated with the divine right of kings was transplanted to the new republic of America remains something of a mystery."), Mikva, "Sovereign Immunity: In a Democracy the Emperor has no Clothes," 1966 U. Ill. L. For. 828 ("Thomas Jefferson said it better than anyone: 'The care of human life and happiness is the first and only legitimate object of good government.' Against such a standard sovereign immunity has been and is a shibboleth that ought to be eliminated from the legal and political vocabulary."); Steadman, "Forgive U.S. its Trespasses?: Land Title Disputes with the Sovereign," 1972 Duke L. J. 15; Jaffe, Judicial Control of Administrative Action, supra, 229, 231; Roady, "Lee, Land, Larson and Malone -- Sovereign Immunity Revisited," 43 Tex. L. Rev. 1062 (1965).

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Indeed, this Court itself has recognized that:

> "[t]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."
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> -- National City Bank v. Republic of China, 348 U.S. 356, 359-60 (1955).

III. THE SOVEREIGN IMMUNITY ASPECT OF THE APPEAL SHOULD BE DISMISSED SINCE REVERSAL ON THAT GROUND WOULD BE A VAIN AND PRODIGAL ACT WHICH WOULD RESULT ONLY IN THE UNNECESSARY FILING OF DUPLICATIVE LITIGATION TO INEVITABLY REACH THE RESULT ORDERED BELOW.

It should be emphasized that appellees consider that this Court can and should dispose of the sovereign immunity question on a far simpler basis than a full-dress reconsideration of that doctrine, to wit, by dismissing the appeal as so improvident and prodigal as not to be worth the consideration of this Court. At the best of times, sovereign immunity is a "purely technical defense,"[28] which eschews "rational judgments concerning the underlying issue of the right to judicial review."[29] But at least in most cases the sovereign immunity doctrine has the important if unprincipled effect of saving the United States money -- whereas in this case it will work no saving of money, but only an unnecessary expenditure of judicial resources. For SSA admits that Congress has waived sovereign immunity to suits for Social Security benefits under 42 U.S.C. § 405(g) -- but argues that the judgment below rests upon § 405(g) as the

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[28] Shoenberg, 77 F.R.D., 1978 Duke L. J. at 20.

Salfi family has not exhausted the administrative appeal "right" which SSA claims is prerequisite to a § 405(g) action.[30] Thus, even if SSA is right in urging that the judgment below cannot be based upon § 405(g), the result will be that Mrs. Salfi or some other member of her class can simply wait out the utterly futile administrative remedy and then bring a class action under § 405(g) to obtain the exact same relief granted below.[31] Thus, SSA's sovereign immunity argument is little more than a request for an advisory opinion which will save the government nothing while wasting the salaried time of the justices and clerks of this Court and, potentially, of the judge and clerks of the United States District Court.

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[30] As indicated infra, the Salfi family urges that the judgment below can be upheld with reference to § 405(g), notwithstanding any alleged failure to exhaust the administrative remedy.

[31] Cf. Jiminez v. Weinberger, No. 72-6609, 94 S.Ct. 2496 (1974) in which this Court upheld a constitutional class action under § 405(g).

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IV. SECTION 405(g)'S WAIVER OF SOVEREIGN IMMUNITY SHOULD BE HELD TO AUTHORIZE THE JUDGMENT BELOW WITHOUT NECESSITY OF EXHAUSTING AN ADMINISTRATIVE REMEDY WHICH WAS FUTILE AND TO WHICH THE CLASS WAS DENIED ACCESS BY SSA.

In any case, the judgment below may properly be construed to rest upon § 405(g)'s waiver of sovereign immunity, even though a literal reading of that statute might seem to contemplate exhaustion of administrative remedies.[32/] Just last Term this Court held that a similar statute whose literal terms barred any judicial review of veteran's claims was not applicable where the claim involved a constitutional attack upon a statute which the Veterans' Administration had no jurisdiction to invalidate. Johnson v. Robison, 415 U.S. 361 (1974). Consistent with that decision, it has recently been held that exhaustion need not be alleged in a § 405(g) action where the only question at issue is a constitutional attack upon a statute which SSA has no jurisdiction to determine. Diaz v. Weinberger, 361 F.Supp. 1, 4-5 (S.D. Fla. 1973). That holding is given added weight here since SSA has explicitly denied the availability of any administrative remedy to the Salfi class -- something which renders SSA's contention that exhaustion is prerequisite to a § 405(g) action

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32/ Although the Salfi family's pleadings below did not specifically cite § 405(g), the issues they raised were appropriate for resolution under that statute and, under the Federal Rules, they were entitled to relief of any type or under any statute relevant to the issues. Wilwording v. Swenson, 404 U.S. 249 (1971) (prisoners are entitled to maintain action for relief from unlawful conditions of imprisonment under either 42 U.S.C. 1983 or federal habeas corpus). See also Scheuer v. Rhodes, Nos. 72-914 and 72-1318 (Dec. 4, 1973) and Conley v. Gibson, 355 U.S. 41, 45 (1957). That the judgment below does not purport to rest upon § 405(g) is immaterial if this Court determines that it may properly be so justified. See e.g., Brown v. Allen, 344 U.S. 443, 460 ("'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'")

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ironic, if not hypocritical.[33/] Appellees submitted in evidence below an SSA hearing officer's refusal to consider the arguments set forth in the Salfi pleadings on the ground that SSA lacks the authority to declare a statute unconstitutional.[34/] Surely

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33/ SSA concedes, by implication at least, that a hearing in this case would have been meaningless and futile since the local SSA office's rejection was made on the basis of uncontested facts which under the challenged provisions barred the Salfi family from receiving benefits. Jurisdictional Statement, p.10, lines 3-9.

34/ The Administrative Law Judge's decision, "In the case of Lillian Daniels," issued November 14, 1973 (and confirmed by HEW on March 27, 1974), reads as follows, in pertinent part:

> "The real problem in the instant case, however, is that the undersigned judge does not have the authority to question the constitutionality of any section of the Social Security Act. Appointed by the Secretary of the Department of Health, Education and Welfare, the undersigned judge has a mandate to correct any errors, mistakes, or injustices in the cases coming before him in which the factual situation has been misunderstood or the applicable sections of law or regulations have been misinterpreted or incorrectly applied.
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> "A CHALLENGE TO THE CONSTITUTIONALITY of a federal statute must be made in the prescribed manner before the United States District Court. Counsel [for the claimant] has called attention to the fact that the precise legal problem presented by Mrs. Daniels has been raised in an identical situation. In Concetta Salfi v. Weinberger, filed on October 18, 1973, in the Northern District of California, No. C.A. 73-1863, the San Mateo Legal Aid Society, together with the CRLA Cooperative Legal Services Center of San Francisco and the California Rural Legal Assistance of Marysville, have grappled with the question whether the Congressional effort to forestall sham claims is unconstitutional. They have suggested that it would be better if a rebuttable presumption were established that 'a marriage was contracted in expectation of death if the wage earner lived less than nine months thereafter. This would place upon the applicant the burden of coming forward with convincing evidence that the marriage was not entered into in contemplation of death.' [Quoting from appellees' points and authorities submitted to the court below.]
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> "THE UNDERSIGNED JUDGE HAS CONSIDERED WITH COMPASSION the request of a 'waiver' presented by the claimant and her counsel. He has no authority to grant such a waiver -- nor, indeed, does the Appeals Council in Washington or even the Secretary himself. Only a Congressional revision of the Social Security Act can grant the discretion which the claimant now asks to be exercised in her favor." (Emphasis in original.)

this Court should not interpret the Congressional intent to have been to make exhaustion a prerequisite to a § 405(g) action even in cases in which the administrative remedy which Congress provided was refused to the claimant by SSA. Such an interpretation would be particularly inappropriate in view of the fact that, although the courts have created and often extended the doctrine of sovereign immunity, in Congress a "chilly feeling against sovereign immunity began to reflect itself in 1797" and has been the "steady legislative trend" ever since. National City Bank v. Republic of China, 348 U.S. 356, 360 (1955). See also Keifer v. Reconstruction Finance Corp., 306 U.S. 375, 379 (1939).

V. AT LEAST WHERE THE ADMINISTRATIVE REMEDY IS FUTILE OR REFUSED, § 405(g)'S WAIVER OF SOVEREIGN IMMUNITY AS TO SUITS FOR SOCIAL SECURITY BENEFITS ALLOWS SUIT UNDER OTHER APPLICABLE STATUTES SUCH AS 28 U.S.C. 1331 AND 1361 AND THE ADMINISTRATIVE PROCEDURE ACT.

Congress has consented to suits by disappointed applicants for Social Security benefits. SSA contends that that consent is inflexibly limited to situations in which the Congressionally established administrative remedy has been exhausted. In order to determine the rectitude of that contention it is necessary to consider the purpose for which Congress established the administrative remedy and required its exhaustion. Seeing no other possibility, we can only presume that the exhaustion requirement here serves the same purposes it serves elsewhere: To afford the government agency involved an opportunity to review and correct factual errors or misinterpretations of law and to afford the parties and the courts the benefits of the agency's experience and expertise as to the subject matter. See e.g., McKart v. United States, 395 U.S. 185 (1969), Parisi v. Davidson, 405 U.S. 34 (1972) and cases there cited. Though solitary in the vast majority of cases, the exhaustion principle, having been adopted for purely practical reasons, is dispensed with in cases involving the constitutionality of statutes which administrative agencies have no power to adjudicate. Johnson v. Robison, supra, Oestereich v. Selective Service Board, 393 U.S. 233, 242, and cases there cited. See also McKart and Parisi, supra. We can only conclude that Congress, in enacting § 405(g), was fully familiar with these and innumerable previous decisions holding neither Congressionally nor judicially mandated requirements are prerequisite to adjudication of constitutional claims. Thus it follows that the exhaustion requirement of § 405(g) does not bar such review here, either because (as argued in the preceding section) it is not under these circumstances a prerequisite to bringing a § 405(g) action, or because the waiver of sovereign immunity applies to suits for Social Security benefits brought under other applicable statutes.

This result is suggested at once by one of the earliest and one of the latest sovereign immunity cases decided by this Court. Kendall v. United States, 37 U.S. (12 Pet.) 621 (1838) and Honda v. Clark, 386 U.S. 484 (1967). In Kendall a statute authorizing the Solicitor of the Treasury to adjust certain claims was held implicit consent for a suit to require the Postmaster General to honor the settlement -- a suit in which "the real parties to the dispute were, therefore, the [claimants] and the United States." 12 Pet. at 611. In Honda, the Court expanded a waiver of sovereign immunity as to suits brought against the Alien Property Custodian by holding that a very abbreviated statute of limitations was tolled according to traditional equitable principles which it implicitly embraced. The factors relied upon by the Court were similar to those relied upon here: (a) the injustice of a contrary holding in depriving litigants of their proper claims; (b) the clarity of Congress' general

purpose of dispensing with immunity in order to allow litigation of contested claims; (c) the evident purpose of the limitation construed being to enhance administrative efficiency "and not primarily as a shield for the Government";[35] and (d) the existence of a traditional equitable principle of which Congress was doubtless aware in enacting the specific limitation involved.

Nor is there anything revolutionary about suggesting that a waiver of sovereign immunity under a statute limited in subject matter is applicable to a claim limited to the same relief brought under general jurisdictional statutes like 28 U.S.C. §§ 1331, 1361 and the Administrative Procedure Act. Where the alternative is unnecessary duplication of litigation this Court has recognized extraordinary remedies without regard to over-technical jurisdictional quibbling. This is the rationale under which this Court created the doctrine of "pendent jurisdiction" whereby federal courts may entertain state claims of which they would not otherwise have jurisdiction if these are factually identical to federal claims of which they do have jurisdiction. Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933) and United Mine Workers v. Gibbs, 383 U.S. 822, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) were creative responses to a situation in which the existence of identical, but jurisdictionally inconsistent, federal and state claims had formerly led to duplicative litigation. Similarly, just this Term this Court found such considerations dispositive in clarifying the authority of federal courts to entertain federal statutory causes of action (of which their jurisdiction is dubious) as pendent to federal constitutional causes of action. Wagons v. Lavine, 415 U.S. 528 (1974), and cases there cited.

Finally it should be noted that only under the theory here advanced (or that of Part IV, supra) can the decision of this Court in Griffin v. Richardson, supra, be explained.

35/ [illegible]

VI. THE DECREE BELOW SHOULD BE UPHELD AS EFFECTUATING SSA'S OWN REGULATIONS WHICH PROVIDE RETROACTIVE BENEFITS WHERE AN APPLICATION WAS ORIGINALLY DENIED DUE TO AGENCY ERROR OR OTHER INADVERTANCE.

An additional reason for upholding the decree below is the provision of SSA's own regulations that persons who are later determined to have erroneously been denied benefits are entitled not only to prospective benefits but to the benefits denied up to four years in the past.[36] Certainly the decree below cannot be barred by sovereign immunity insofar as it simply requires SSA to accord the Salfi class the same treatment which would be accorded to any other Social Security applicants who had erroneously been denied benefits.

VII. THE DECREE BELOW DOES NO MORE THAN EFFECTUATE THE DUE PROCESS CLAUSE UNDER WHICH THE SALFIS AND THOSE SIMILARLY SITUATED WERE ALWAYS ENTITLED TO HAVE THEIR APPLICATIONS CONSIDERED WITHOUT REFERENCE TO THE INVALIDATED CONCLUSIVE PRESUMPTION.

The decree does not require the payment of damages, but the reprocessing of applications which were originally erroneously rejected upon unconstitutional grounds and the payment of benefits to those not otherwise ineligible. In this sense, the decree below is merely an effectuation of the supremacy of the

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36/ 20 C.F.R. § 404.957 reads, in pertinent part:

> "An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final under § 404.905, § 404.916, § 404.940, or § 404.951 may be reopened:
> (a) Within 12 months from the date of the notice of the initial determination (see § 404.903), to the party to such determination, or
> (b) After such 12-month period, but within 4 years after the date of the notice of the initial determination, upon a finding of good cause for reopening such determination or decision ..."

constitutional, a recognition that the invalidated provisions were ab initio null and void, a kind of nunc pro tunc order which returns all the actors to their original positions. This rationale is not inconsistent with Edelman v. Jordan, supra, since that case was based upon the Eleventh Amendment which specifically limits the supremacy of the Constitution with regard to federal jurisdiction over suits against states.[37] As sovereign immunity is a purely judicial construct, it is not specially exempt from, and indeed should be entirely subject to, the imperatives of our constitutional system.

VIII. THIS IS A SUIT AGAINST OFFICERS OF THE UNITED STATES FOR WHICH CONGRESS HAS SPECIFICALLY PROVIDED BY LAW AND THUS NOT AN UNCONSENTED SUIT AGAINST THE UNITED STATES ITSELF.

Although the District Court did not rule on them, plaintiffs set out four jurisdictional basis besides 28 U.S.C. § 1331. Those were: (a) the Administrative Procedure Act; (b) 28 U.S.C. § 1361 (mandatory relief against federal officers); (c) 42 U.S.C. § 1985(2) (civil rights conspiracy statute) and its jurisdictional counterpart, 28 U.S.C. § 1343(1); (d) a cause of action springing from the Fifth Amendment itself without necessity of Congressional authorization as per Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and cases there cited. While there are as yet no decisions on the point, appellees would contend that sovereign immunity is not a bar to the bringing of a case like the present under § 1985 or under the Bivens constitutional cause of action.[39]

37/ Footnote 19 in Edelman specifically disclaims any holding as to whether a state court could or should provide the relief barred by the Eleventh Amendment on the grounds that that Amendment has no effect upon the state judiciary and that the question would be purely one of sovereign immunity with which Edelman was not concerned.

The Administrative Procedure Act authorizes such broad review of administrative action that it has frequently been held to constitute a waiver of sovereign immunity. Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663, 668-669 (2 Cir. 1973) (sovereign immunity does not bar suit to require HEW to correct admittedly inadequate reimbursement for Medi-Cal services performed by contracting agency), Constructores Civiles de Centroamerica v. Hannah, 459 F.2d 1183, 1191 (D.C. Cir. 1972) (sovereign immunity does not bar suit for "mandatory injunction and declaratory judgment" to require A.I.D. to consent to the letting of a contract to the plaintiff company), Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 873-874 (D.C. Cir. 1970) (sovereign immunity does not bar action for declaratory relief of plaintiff's right to contract award where, allegedly, another bidder was improperly accepted), Kletscha v. Driver, 411 F.2d 436, 445 (2 Cir. 1969) (sovereign immunity does not bar suit by government employee for injunctive and declaratory relief from allegedly illegal disciplinary transfer), Mulry v. Driver, 366 F.2d 544, 547 (9 Cir. 1966) (sovereign immunity does not bar suit by government employees to invalidate regulation which prevents them from engaging in after-hours employment), Estrada v. Ahrens, 296 F.2d 690, 695 (5 Cir.

38/ Since Bivens involved federal officers and a constitutional provision directed to the federal government, it is clear that Bivens-type litigation may be brought against federal officers. Since § 1985, unlike its companion, 42 U.S.C. 1983, does not contain the limiting words, "color of state law," it is equally applicable to federal officers. City of Kenosha v. Bruce, 412 U.S. 507 (1973), holds (by implication) that § 1985 as well as § 1983 actions may not be maintained against state agencies. But the basis of this holding is the debate on the "Sherman Amendment" which showed Congressional dubiety as to whether federal courts could entertain suits against state agencies. Obviously, Congress could have entertained no doubt that it could authorize federal courts to entertain causes of action against federal officers or agencies.

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1961) (sovereign immunity does not bar action by alien to require his admission into the United States). Per contra: Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971) and cases there cited.

Congress enacted 28 U.S.C. § 1361 for the precise purpose of providing a mandamus-type cause of action against federal officers. In doing so, it implicitly consented to litigation like the present. This is particularly true since Congress must have been aware of the numerous decisions by this Court holding sovereign immunity no bar to mandamus actions to force federal officers to pay pension, retirement and/or other benefits comparable to Social Security. See e.g., Miguel v. McCarl, 291 U.S. 442, 455. See also Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900). Just last Term this Court held in a case brought under § 1361 that a class (which it redefined) could maintain an action to mandate re-examination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation. Morton v. Ruiz, 415 U.S. 199 (1974). (The judgment must rest either upon the view that sovereign immunity was waived by § 1361, or that it was never involved because the officers sued were acting in excess of their authority -- see Part I of this section, supra.)

IX. A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR THE IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL.

It has been held that Larson Footnote 11 is inapplicable where the fund which is subject to the suit has already been appropriated by Congress for the purpose of being so disbursed. Commonwealth of Pennsylvania v. Lynn, 362 F.Supp. 1363, 1368-1369 (D. D.C. 1973), Local 2677, AFGE v. Phillips, 358 F.Supp. 60, 68-69 (D. D.C. 1973). See e.g., State Highway Commission v. Volpe, 479 F.2d 1099, 1123 (8 Cir. 1973 ("notwithstanding, we do not consider the court's decree in the instant case as being affirmative in nature [within the prohibition of the Larson footnote]. It requires only that the defendant officers cease unauthorized action. Cf. Rockbridge v. Lincoln, 449 F.2d 567, 573 (9 Cir. 1971). The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.")

Similarly, the judgment below cannot be said to operate against the Treasury because Social Security benefits are paid from a trust fund derived from contributions of employers and wage earners rather than a regular appropriation of Treasury funds. And, again, the decree does not mandate the payment of benefits but only re-examination of eligibility without application of the invalidated conclusive presumption.

CLASS ACTION

As noted in the Statement of Facts, SSA stipulated to the Rule 23(b)(2) allegations of the Complaint and to having all issues of the case decided in one combined hearing. Presumably it did so in hopes of obtaining a decree in its favor which would bind the class. Only after the matter was decided adversely did SSA make an objection to the class action procedure in its Motion for Rehearing. That objection, which is pressed here, goes not to the appropriateness of the class action, the definition of the class, or the representativeness of the Salfi family, but only to

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the fact that the order required SSA to notify all persons who had previously been denied benefits on the basis of the invalidated provisions that they could renew their applications. SSA argues that, since retroactive class damages were awarded, this must have been an action under Rule 23(b)(3) in which the notice ordered must be paid for by the plaintiffs according to Eisen v. Carlysle & Jacqueline, No. 73-203 (May 28, 1974). To briefly correct this bizarre combination of misconstructions:

First, the notice required does not at all relate to the pre-judgment notice requirements of Rule 23(c)(2), but rather is the kind of post-judgment notice decreed where it is necessary to correct previous widespread wrongful or erroneous conduct of the defendant.[39/] The necessity here arises out of the fact that SSA had previously denied benefits on the basis of the invalidated provisions to thousands of applicants across the country. These people would never have the opportunity to receive either prospective or retrospective benefits unless notified that they should reapply. Thus this notice cannot serve the same purpose of that contemplated by Rule 23(c)(2) which is to notify members of a (b)(3) class of the pendency of the lawsuit so that they may exercise their opportunity to opt out. Such pre-judgment notice, the cost of which Eisen requires plaintiffs to bear, has no application to a (b)(2) lawsuit like the present since class members may not opt out of a (b)(2) lawsuit. But even if they could, the post-judgment notice which the court below ordered would clearly not be an Eisen-type notice since it is a little late to try to opt out of the class after final judgment has been entered. Second, had the notice been a (c)(2) notice like that in Eisen, the order that SSA provide it would still have been proper. Nothing in Eisen purports to change the general rule that the cost of notice in a class action -- like all other costs -- is ultimately borne by the losing party.[40/] Since at the time notice was ordered SSA had already been determined the losing party, it was properly required to pay the expenses of notification. Moreover, notification by SSA was the only practicable method since the membership of the class can be determined only by examining Social Security files and computers. Under the confidentiality requirements of the Social Security Act (42 U.S.C. § 1306), only SSA employees can make such an examination and they cannot divulge the results thereof.

Third, SSA to the contrary notwithstanding, this was a Rule 23(b)(2), rather than a (b)(3) lawsuit since the prayer for retroactive damages was only terciary in importance to the prayer for declaration of the unconstitutionality of the challenged provisions and equitable relief against their enforcement.[41/] Nothing in Eisen purports to apply (b)(3) notice requirements to (b)(2) actions -- which the opinion carefully differentiates, describing

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39/ See e.g., Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 725 (8 Cir. 1973) (notice required of correction of previous discriminatory hiring policies), United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) (notification of acceptance from previous segregated school police required to be sent to every Black family), Bivell v. Savannah-Chatham Board of Education, 348 F.2d 55, 65 (5 Cir. 1965) (same), Miller v. School District No. 2, 256 F.Supp. 370, 374 (D. S.C. 1966) (same).

40/ See e.g., Katz v. Carte Blanche Corp., 53 F.R.D. 539, 546 (W.D. Penn. 1971) ("The cost of notice, of course, will be recoverable by plaintiffs if the action is prosecuted successfully."), Dudley v. Southeastern Factor and Finance Co., 57 F.R.D. 177, 180 (N.D. Ga. 1972) and cases there cited.

41/ It is self-evident that the relief sought was predominantly injunctive and declaratory since its primary effect was to invalidate federal legislation which bars the receipt of benefits for years in the future. The fact that some members of the class might also qualify for past due benefits is incidental. Thus, for instance, according to SSA's figures, Mrs. Salfi would be entitled to only $2,461.20 in back benefits, but (at her present life expectancy of 28 years) $59,068.80 in future benefits. See pp. 7-8 of Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction setting out the retroactive benefit period as 14 months, the amount of benefits per month at $303.40 minus $187.60 which the Salfi family receives in Social Security Disability benefits.

as "broadly apt for injunctive or declaratory relief. [Emphasis added.]" Id., n. 2, adopting the language of the Advisory Committee's note, "Proposed Rules of Civil Procedure," 39 F.R.D. at 98, 102 (1966).

In a footnote, SSA mentions the dictum of the Court of Appeals in Eisen II[42] (which was not reviewed by this Court) suggesting that individual notice and the right to opt out is required by due process even in (b)(2) actions. If correct, this suggestion would require the invalidation of Rule 23 as presently constituted since its notice and opting out provisions apply only in (b)(3) actions.[43] As a practical matter a requirement of individual notice in (b)(2) actions would end class race and sex discrimination litigation under Title VII of the Civil Rights Act of 1964, class school desegregation litigation and class challenges to the constitutionality of federal, state and local legislation or administrative practices, to mention but a few of the areas hardest hit. Perhaps for that reason the Eisen II dictum has been ignored by innumerable subsequent decisions of this Court,[44] limited to its facts in an opinion of two judges of the Eisen circuit[45] and repudiated or ignored in several other Court of Appeals opinions.[46]

To determine the rectitude of the Eisen II dictum we must weigh the interests involved in receiving notice both generally and in the specific circumstances of each individual case since this is the method by which due process questions are resolved.[47] The relevant interest here is that of the individual member of the class in receiving notice so that he may opt out and thus not be bound by the ensuing judgment.[48] But, on analysis, it becomes apparent that, at least in a case like the present, (b)(2) class members are no differently situated if they receive notice and the opportunity to opt out than if they are bound by the class judgment without ever having the opportunity to opt out. Obviously if the class action is successful, the Salfi class member has no interest in opting out. Thus his interest in notice and opting out arises only if he fears that the action will be lost and desires not to be bound by that loss. But even if not bound,

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42/ 391 F.2d 555, 564-565, cited at Jurisdictional Statement, p.13, n. 9.

43/ Although nothing in Rule 23 excludes notice to a (b)(2) class, the Advisory Committee's note makes it clear that such notice is not required. Thus, at 39 F.R.D. 105 the note states that (b)(2) judgments are binding on the entire class, but (b)(3) judgments are binding only upon those class members who have received individual notice. And at 39 F.R.D. 102, the note states that a (b)(2) action is "usually one whose members are incapable of specific enumeration." Obviously if the class membership cannot be enumerated, it cannot be identified for notification.

44/ E.g., Norton v. Ruiz, supra, in which the Court remanded with specific instructions as to redefining the class, but neglected to raise any question of a notice requirement and Griffin v. Board of Supervisors, supra, and Lee v. Macon, supra, each of which involved class actions identical to the present case.

45/ Lee v. Macon County Board of Education, 300 F.Supp. 720, 722, n.3 (M.D. Ala. 1969).

46/ Bing v. Roadway Express, Inc., 485 F.2d 441, 447-449 (5 Cir. 1973), Hammond v. Powell, 462 F.2d 1053, 1055 (4 Cir. 1972), Yaffe v. Powers, 454 F.2d 1362, 1366 (1 Cir. 1972), Arkansas Education Association v. Board of Education, 446 F.2d 763 (8 Cir. 1971), Robinson v. Lorillard Corp., 444 F.2d 791 (4 Cir. 1971).

47/ See e.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972), United States v. Caltex, Inc., 344 U.S. 149 (1953).

48/ Although the analysis here is limited to the interest of the class member, two other interested parties might also be identified: the Federal Government (i.e., the Federal Courts), and the party adverse to the class. Since the United States has enacted Rule 23 as it stands, its interest is presumably in encouraging non-notice class actions as the most efficient means of disposing of what might otherwise be a multitude of small individual cases. The hypothetical adverse party, on the other hand, has no interest in the notice question either way, but only in having it clearly resolved as it is now in present Rule 23. This is because his concern is simply that the class be bound by an adverse judgment and he therefore should be willing to accept any procedure (i.e., notice or not) which accomplished this. Since in all events the adverse party, unlike the absent class member, will have his day in court, whatever his interest in the notice question may be it does not rise to a level of due process significance.

had to question the class action procedure and to claim that it is not bound to provide class relief. As the Court of Appeals for the Fifth Circuit held in a virtually identical situation, SEA acquiesced in an implicit (b)(2) action, leading the court to believe (in this case correctly) that there was no dispute as to the rectitude of the class action. Bing v. Roadway Express, Inc., supra. Although the factual situation was very different, the language of Mr. Justice Douglas, speaking for the Court in Johnson v. United States, 318 U.S. 198, 201 (1943), seems entirely appropriate: "The Court only followed the course which [the defendant] himself helped to chart and in which he acquiesced until the case was argued on appeal."

For the foregoing reasons, appellees urge that the judgment below be affirmed and/or that it be affirmed on the constitutional question, and the class action and sovereign immunity issues be dismissed.

DATED: September 25, 1974.

Respectfully submitted,

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42 U.S.C. 416(e) provides:

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's sur-

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viving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. 416(k) (Supp. II) provides:

> (k) Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.
>
> The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—
>
> (1) his death—
>
> (A) is accidental, or
>
> (B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or
>
> (2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce, or
>
> (B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;
>
> except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

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AFFIDAVIT OF SERVICE BY MAIL

I, Jeanne Pritchard, certify that I am a citizen of the United States, over the age of 18 years, and not a party to the within action, nor an attorney or record. My place of employment and business address is 1212 Market Street, San Francisco, California 94102.

I served a true copy of the attached MOTION TO AFFIRM AND/OR DISMISS on the Appellant herein by placing a true copy thereof in an envelope addressed as follows:

Robert H. Bork, Solicitor General
Carla A. Hills, Assistant Attorney General
William L. Patton, Assistant to the Solicitor General
William Kanter, Esq.
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Washington, D.C. 20530

Said service is in compliance with paragraphs 1 and 3 of the Supreme Court Rule 23. All parties required to be served have been served.

DATED: September 26, 1974.

JEANNE PRITCHARD

Sworn and subscribed to
before me, a Notary Public,
this ___ day of September,
1974.

NOTARY PUBLIC

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Supreme Court, U. S.
FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-214

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, APPELLANTS

v.

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	6
Argument	7
I. The nine-month duration-of-marriage requirement does not deny appellees due process of law	7
A. The statute rationally promotes a valid legislative goal and does not invidiously discriminate against any class	7
B. The "conclusive presumption" analysis should not be extended to classifications under the Social Security Act	12
C. The statutes at issue here are not unconstitutional under this Court's "conclusive presumption" decisions	15
II. This suit is barred by sovereign immunity insofar as it seeks retroactive benefits	16
III. Any decision invalidating the duration-of-marriage requirement should be given only prospective effect	19
IV. Class action issues	21
Conclusion	23
Appendix	25

366-535—74——1

Cases:

	Page
Beale v. *Blount*, 461 F. 2d 1133	17
Chevron Oil Co. v. *Huson*, 404 U.S. 97	7, 19, 20
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371	19
Cleveland Board of Education v. *LaFleur*, 414 U.S. 632	5, 12
Cotter Corporation v. *Seaborg*, 370 F. 2d 686	17
Dugan v. *Rank*, 372 U.S. 609	16
Edelman v. *Jordan*, 415 U.S. 651	6, 18, 19, 20–21
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156	21
Flemming v. *Nestor*, 363 U.S. 603	6, 7, 14
Hagler v. *Finch*, 451 F. 2d 45, certiorari denied, 405 U.S. 1071	10
Hawaii v. *Gordon*, 373 U.S. 57	16–17
Jefferson v. *Hackney*, 406 U.S. 535	15
Jimenez v. *Weinberger*, No. 72–6609, decided June 19, 1974	8, 20
Land v. *Dollar*, 330 U.S. 731	16
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	17, 18
Malone v. *Bowdoin*, 369 U.S. 643	17
North American Co. v. *Securities and Exchange Commission*, 327 U.S. 686	14
Richardson v. *Belcher*, 404 U.S. 78	6, 8
Richardson v. *Morris*, 409 U.S. 464	17
Richardson v. *Perales*, 402 U.S. 389	16
Rothstein v. *Wyman*, 467 F. 2d 226, certiorari denied, 411 U.S. 921	20, 21
Stanley v. *Illinois*, 405 U.S. 645	5, 12
Stanton v. *Weinberger*, 502 F. 2d 315	10
United States Department of Agriculture v. *Murry*, 413 U.S. 508	12
Vlandis v. *Kline*, 412 U.S. 441	5, 6, 12, 13, 16

Constitution, statutes and rule:

	Page
United States Constitution:	
Fifth Amendment	2, 4, 5, 7, 8, 17
Eleventh Amendment	18, 19
Social Security Act, Title II, 49 Stat. 622, as amended and added, 42 U.S.C. 401 *et seq.*:	
42 U.S.C. 402	14
42 U.S.C. 402(b)(1)	11
42 U.S.C. 402(e)(1)	11
42 U.S.C. 402(g)(1)	11
42 U.S.C. 405(g)	7, 17, 22, 25–26
42 U.S.C. 405(h)	4, 17, 26
42 U.S.C. 416(b)	13
42 U.S.C. 416(c)	3, 13, 27
42 U.S.C. 416(c)(5)	1, 2, 5, 7, 25
42 U.S.C. (Supp. II) 416(e)	3, 13, 27–29
42 U.S.C. (Supp. II) 416(e)(2)	1, 2, 5, 7, 28
42 U.S.C. 416(f)	13
42 U.S.C. 416(g)	13
42 U.S.C. (Supp. II) 416(k)	3, 16, 29–30
Social Security Act Amendments of 1939, 53 Stat. 1360 *et seq*	8
Section 209(j)	9
Section 209(k)	9
28 U.S.C. 1331	4, 17
28 U.S.C. 1343(1)	17
28 U.S.C. 1361	17
28 U.S.C. 2282	4
28 U.S.C. 2284	4
Rule 23, Fed. R. Civ. P.	21

Miscellaneous:

	Page
A Report of the Social Security Board, H. Doc. No. 110, 76th Cong., 1st Sess.	11
3 Davis, *Administrative Law Treatise*, § 27.02, p. 548 (1958 ed.)	19
Final Report of the Advisory Council on Social Security (1938)	8
Hearings before the House Committee on Ways and Means, on Social Security, 76th Cong., 1st Sess.	8
H. Rep. No. 92–231, 92d Cong., 2d Sess.	9
H. Rep. No. 728, 76th Cong., 1st Sess.	11
H. Rep. No. 2526, 79th Cong., 2d Sess.	9
S. Rep. No. 734, 76th Cong., 1st Sess.	11
S. Rep. No. 1862, 79th Cong., 2d Sess.	9

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v.

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion and order of the district court (J.S. App. pp. 1a–8a) are reported at 373 F. Supp. 961.

JURISDICTION

The judgment of the district court, which held unconstitutional 42 U.S.C. 416 (*e*)(5) and (e)(2), was entered on April 16, 1974 (J.S. App. pp. 9a–11a).

A timely motion for reconsideration was denied on May 9, 1974 (*id.* at p. 12a). A notice of appeal to this Court was filed on May 15, 1974 (*id.* at pp. 19a–20a). On November 11, 1974, this Court noted probable jurisdiction. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the duration-of-marriage requirement in 42 U.S.C. 416(e)(5) and 42 U.S.C. (Supp. II) 416(e)(2) violates the Due Process Clause of the Fifth Amendment.

2. Whether sovereign immunity bars this suit insofar as it seeks retroactive social security benefits.

3. Whether, insofar as this suit seeks retroactive benefits, in certifying this suit as a class action, the district court improperly placed the burden of notifying members of the class upon the government rather than upon the plaintiffs.

STATUTES INVOLVED

The statutes involved are reproduced in the Appendix, *infra*, pp. 25–30.

STATEMENT

This case involves the constitutionality of provisions of the Social Security Act that define the circumstances under which widows and children qualify for monthly survivors benefits under Title II of the Act. The specific provisions challenged here, 42 U.S.C. 416(e)(5) and (e)(2), provide that a surviving wife of a deceased wage earner who does not otherwise

satisfy the statutory conditions of eligibility[1] may qualify for benefits if "she was married to [the wage earner] for a period of not less than nine months immediately prior to the day on which he died,"[2] and that a surviving child who fails to satisfy other eligibility requirements may qualify if he or she had been a stepchild of the wage earner for at least nine months prior to the wage earner's death.[3]

The facts in this case are not in dispute. On May 27, 1972, appellee Concetta Salfi married Londo L. Salfi,

[1] The surviving wife of a deceased wage earner can qualify for benefits without regard to the duration-of-marriage requirement if (1) she is the mother of his child, (2) she legally adopted his minor child during their marriage, (3) he legally adopted her minor child during their marriage, (4) they legally adopted a minor child during their marriage, or (5) she was or would have been entitled to certain benefits upon application in the month prior to their marriage. 42 U.S.C. 416(e).

[2] The surviving wife also is eligible for benefits if the Secretary of Health, Education, and Welfare determines that the wage earner could reasonably have been expected to live nine months at the time of the marriage, and (1) his death was either accidental or in the line of active military duty, or (2) in the case of the surviving wife's remarriage to the same wage earner after a divorce, the previous marriage lasted for at least nine months. 42 U.S.C. (Supp. II) 416(k). That subsection also defines an accidental death as one which results exclusively from bodily injuries caused "solely through violent, external, and accidental means" where the death occurs no more than three months after the accident.

[3] The surviving child also qualifies for benefits if he or she was the child or legally adopted child of the deceased wage earner or his spouse, 42 U.S.C. 416(e), or, if he or she was the stepchild of the wage earner, in those circumstances where 42 U.S.C. 416(k) would qualify a surviving wife. See note 2, *supra*.

a wage earner fully insured under the Social Security Act (App. 19). On November 21, 1972, less than six months after the marriage, Londo L. Salfi died from a heart attack (App. 16). Appellee Concetta Salfi on behalf of herself and Doreen Kalnins, her daughter from a prior marriage, filed for mother's and child's insurance benefits on the account of Londo L. Salfi. The Secretary denied the applications initially and upon reconsideration because the applicants did not satisfy the statutory standard of eligibility for "widow" and "child," respectively, since Londo Salfi had died from natural causes less than nine months after the marriage.

Appellees then commenced this suit alleging that the nine-month duration-of-marriage requirement was a "conclusive presumption" which denied them due process of law in violation of the Fifth Amendment. The suit was brought as a class action seeking declaratory and injunctive relief and retroactive benefits. A three-judge court convened pursuant to 28 U.S.C. 2282 and 2284, denied the government's motion to dismiss, which asserted, *inter alia,* that the court was without jurisdiction because 42 U.S.C. 405(h) specifically precluded review under 28 U.S.C. 1331, and that sovereign immunity barred the suit.

On cross-motions for summary judgment, the court held that the nine-month duration-of-marriage requirement created a "conclusive presumption" that a marriage lasting fewer than nine months before the wage earner's death was entered into "for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled" (J.S. App. p. 6a). Relying on this Court's recent decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, *Vlandis* v. *Kline,* 412 U.S. 441, and *Stanley* v. *Illinois,* 405 U.S. 645, the court held that this presumption violated the Due Process Clause of the Fifth Amendment "insofar as [it denied] plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits" (J.S. App. p. 7a).

Although appellees had brought this action as a class suit, the district court took no action with respect to the class until it granted appellees' motion for summary judgment. The court then certified the class as consisting of "all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security Survivors' benefits by operation of 42 U.S.C. §§ 416(e)(5) and (e)(2)" (J.S. App. p. 7a). It ordered the Secretary to notify all members of the class and to provide them benefits from the time of original entitlement. These retroactive benefits are estimated by the Social Security Administration to aggregate approximately $35 million.[4]

[4] The Social Security Administration has reached this estimate on the assumption that the retroactive benefits ordered by the district court extend only back to 1967, when the duration-of-marriage requirement was reduced from twelve to nine months. If the district court order for retroactive benefits includes all individuals denied benefits under the twelve month provision—which was enacted in 1939—the Social Security Administration estimates that the total amount of benefits would exceed $100 million.

566-535—74——2

SUMMARY OF ARGUMENT

The district court erred in holding that the duration-of-marriage provision embodies a conclusive presumption violative of due process. The conclusive presumption doctrine should not be extended to classifications under the Social Security Act since this Court has consistently held that provisions of that Act violate due process "only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor,* 363 U.S. 603, 611; *Richardson* v. *Belcher,* 404 U.S. 78.

The duration-of-marriage requirement is rationally related to a legitimate goal—the protection of the limited resources of the Social Security Trust Fund against claims arising from relationships formed for the purpose of obtaining benefits—and does not arbitrarily discriminate against any class.

Even assuming that the conclusive presumption doctrine is applicable to Social Security Act classifications, the duration-of-marriage provision is not unconstitutional. The duration-of-marriage provision is a prophylactic rule which avoids a traditionally disfavored intrusion into protected areas of marital privacy and a "reasonable alternative means of making the crucial determination" (*Vlandis* v. *Kline,* 412 U.S. 441, 452) does not exist.

The district court also erred in awarding retroactive benefits. An award of retroactive benefits is tantamount to an award of money damages and is barred by the doctrine of sovereign immunity. *Edelman* v. *Jordan,* 415 U.S. 651. The only congressional waiver of sovereign immunity applicable to claims

under the Social Security Act is 42 U.S.C. 405(g). That provision, which requires exhaustion of administrative remedies and the filing of suit within 60 days after a final denial of a claim by the Secretary, was not complied with in this case.

Finally, if this Court determines that the duration-of-marriage requirement is unconstitutional and that an award of retroactive benefits is not barred by sovereign immunity, we urge, under the tests of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, that the decision be given only prospective effect.

ARGUMENT

I. THE NINE-MONTH DURATION-OF-MARRIAGE REQUIREMENT DOES NOT DENY APPELLEES DUE PROCESS OF LAW

A. *The Statute Rationally Promotes A Valid Legislative Goal and Does Not Invidiously Discriminate Against Any Class.*

The sole issue regarding the constitutionality of the statute is whether the nine-month duration-of-marriage requirement of 42 U.S.C. 416(*e*)(5) and (e)(2) is consistent with the Fifth Amendment's Due Process Clause. In *Flemming* v. *Nestor,* 363 U.S. 603, 611, this Court announced the standard for determining the constitutionality of statutory classifications under the Social Security Act:

> Particularly where we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

This standard was reaffirmed in *Richardson* v. *Belcher*, 404 U.S. 78, 84, where the Court held that "[i]f the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." In the most recent case decided under the Social Security Act, *Jimenez* v. *Weinberger*, No. 72-6609, decided June 19, 1974, the statutory classification there involved was invalidated only because the Court concluded that "[the statute] would discriminate between the two subclasses of after-born illegitimates without any basis for the distinction * * *" (slip op. 7–8).

Since, as we now show, the nine-month duration-of-marriage requirement is rationally related to a legitimate governmental interest, and does not invidiously or arbitrarily discriminate against any class, the provisions in question do not deny appellees due process of law.

The initial duration-of-marriage requirements were enacted in the 1939 Social Security Act Amendments, 53 Stat. 1360, 1377, at the same time that Congress extended monthly benefits to the dependents and survivors of insured wage-earners. Both the testimony of Dr. Altmeyer, Chairman of the Social Security Board, and the *Final Report of the Advisory Council on Social Security* (1938), which served as a basis for the 1939 Amendments, indicate that a durational requirement was considered necessary to discourage individuals from entering into relationships solely for the purpose

of acquiring enhanced benefits.[5] The rationale of these durational requirements was underscored by the 1946 Social Security Amendments, which reduced the duration-of-marriage requirement in the analogous definition of "wife" from five to three years. As the committee reports stated, this reduction was adopted because three years was considered a sufficient deterrent: "Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H. Rep. No. 2526, 79th Cong., 2d Sess., pp. 25–26. S. Rep. No. 1862, 79th Cong., 2d Sess., pp. 33–34.[6]

[5] Hearings before the House Committee on Ways and Means, on Social Security, 76th Cong., 1st Sess., pp. 31–32 (recommendations of Advisory Council) and p. 2297 (testimony of Dr. Altmeyer). At that time, Congress adopted a five-year duration-of-marriage requirement in order for a woman to qualify for wife's benefits, and twelve-month requirements for widows and children to qualify for benefits. Sections 209(j) and (k), respectively, 53 Stat. 1377.

While the legislative history of the Amendments does not contain the data or testimony upon which either the Advisory Council or the Committees based their recommendations, that does not show that their apprehensions were unjustified. Since there is no constitutional requirement that Congress document or preserve the statistical bases for each legislative decision in anticipation of subsequent judicial review, the absence of relevant data may simply reflect that Congress was sufficiently convinced of the need for the provisions to dispense with elaborate proof.

[6] The later legislative commentary, including the 1972 House Report cited by the district court (J.S. App. p. 5a), is consistent with this preventive rationale. That report stated: "This duration-of-relationship requirement is included in the law as a *general precaution* against the payment of benefits where the marriage was undertaken to secure benefit rights." H. Rep. No. 92–231, 92d Cong., 2d Sess., p. 55 (emphasis supplied).

Congress determined that it was necessary to protect the limited resources of the Social Security Trust Fund from claims resulting from the forming of relationships for the purpose of obtaining benefits. In seeking to implement that goal—the legitimacy of which is not disputed by appellees—Congress was confronted with two basic alternatives: The establishment of (1) a prophylactic rule of uniform application, or (2) a system for inquiry on a case-by-case basis into the intent of claimants.

In adopting the duration-of-marriage requirement, Congress validly chose the prophylactic rule approach. That requirement cannot properly be characterized as an evidentiary presumption concerning intent. Indeed, intent is not relevant to eligibility for survivors benefits, *i.e.*, a claimant who admits that the marriage was contracted to obtain benefits will receive benefits if the marriage has lasted more than nine months.

The duration-of-marriage requirement rests on sound policy considerations (see pp. 15–16, *infra*) and it is rationally related to Congress' underlying purpose—the protection of the Trust Fund. The durational provision deters from marriage only those individuals motivated by the desire to obtain benefits. To the extent that individuals wish to marry for reasons unrelated to Social Security benefits, their decision would be unaffected by the prospect that a right to benefits may not automatically result from the marriage.[7]

[7] The Act contains comparable provisions intended to protect against abuse through adoption of children solely to qualify for benefits, which the courts of appeals have sustained. See, *e.g.*, *Stanton* v. *Weinberger*, 502 F. 2d 315, 320 (C.A. 10); *Hagler* v. *Finch*, 451 F. 2d 45, 48 (C.A. 9), certiorari denied, 405 U.S. 1071.

The durational requirement does not invidiously or irrationally discriminate against appellees with regard to the primary purpose of the Act—the provision of benefits on the basis of probable need for benefits because of loss of wage earner support. The requirement defines two classes for the purposes of entitlement to monthly survivors benefits: one class consists of claimants such as appellees whose marriages lasted less than nine months before the wage earners' deaths, while the other class encompasses individuals whose marriages lasted longer.

Congress could rationally conclude that the individuals in the latter class would tend to have a greater need for benefits because a greater financial dependency on the wage earner results from marriages of longer duration. Marriages which last less than nine months are, on the other hand, likely to induce a lesser degree of dependency, *e.g.*, it would be relatively easier for such individuals to reenter the work force and qualify for benefits on their own account if they had left employment less than nine months before. Paying benefits only to the widows of marriages of longer duration is therefore consistent with the congressional policy of allocating the limited monies of the Trust Fund where the probable need was greatest.[8]

[8] The Act contains many such legislative determinations of probable need which are not necessarily coextensive with the underlying legal relationships. For example, Congress provides monthly benefits for a divorced woman on the account of her former spouse even though the marriage is legally terminated at the time the woman applies for benefits. See 42 U.S.C. 402 (b)(1), 42 U.S.C. 402(e)(1), 42 U.S.C. 402(g)(1).

As Congress recognized when first enacting monthly survivors benefits in 1939:

> The new plan will eliminate most lump sum benefits and will *substitute monthly benefits for those groups of survivors whose probable need is greatest.* [H. Rep. No. 728, 76th Cong., 1st Sess., p. 11; S. Rep. No. 734, 76th Cong., 1st Sess., p. 11 (emphasis supplied).][9]

B. *The "Conclusive Presumption" Analysis Should Not Be Extended To Classifications Under the Social Security Act.*

This Court's "conclusive presumption" decisions, relied upon by the district court, are inapposite here. The instant classification neither touches upon fundamental rights (*Stanley* v. *Illinois,* 405 U.S. 645 (right to custody of one's own children)), nor is it so arbitrary as to constitute a denial of due process of law (*Vlandis* v. *Kline,* 412 U.S. 441 (residency status for university students permanently fixed by their address at time of application); *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (entire household denied food stamps for twelve months where one member was declared a tax dependent in a prior year)). Moreover, unlike the regulation involved in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, which may have impinged on a teacher's decision

[9] See also *A Report of the Social Security Board*, H. Doc. No. 110, 76th Cong., 1st Sess., p. 7:

"Under a social insurance system the primary purpose should be *to pay benefits in accordance with the presumptive needs of the beneficiaries*, rather than to make payments to the estate of a deceased employee regardless of whether or not he leaves dependents" (emphasis supplied).

to bear children, the durational provision does not deny benefits that an individual would have received had she not married. The durational provision would affect an individual's decision to marry only if the decision were motivated solely by the desire to receive benefits.

Furthermore, if the "conclusive presumption" doctrine were applied to the Social Security Act, the probable result would be the piecemeal invalidation of many entitlement provisions of Title II of that Act.[10] Almost every statutory entitlement provision can be recast as a "conclusive presumption" with regard to the purpose of the program to which the entitlement provision relates. Under this analysis all persons satisfying the requirements of the statute are "conclusively presumed" to fit within the purpose and, conversely, persons failing to satisfy the requirements are "conclusively presumed" to be beyond the statute's purview. Thus, many statutes would be unconstitutional because of slight variations between the "presumed" facts and those demonstrably correct.[11]

[10] For example, duration-of-relationship requirements are incorporated in the basic definitions which determine the right to most of the monthly survivors benefits under the Act. See 42 U.S.C. 416(b) ("wife"); 42 U.S.C. 416(c) ("widow"); 42 U.S.C. 416(e) ("child"); 42 U.S.C. 416(f) ("husband"); 42 U.S.C. 416(g) ("widower").

[11] In *Vlandis* v. *Kline*, *supra*, 412 U.S. at 452, this Court held that "it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not *necessarily or universally true in fact* * * *" (emphasis supplied).

The impact of the conclusive presumptive doctrine as applied to social welfare legislation is illustrated by the possible applica-

In a manner common to social welfare legislation, the Social Security Act sets out conditions of entitlement for specific benefits. The duration-of-marriage requirement is merely one of a myriad of bases of eligibility for benefits, such as age, relationship, earnings and current connection with the work force. The failure to meet any of these bases precludes benefits.

This does not, however, make them "conclusive presumptions" of ineligibility. Congress must and properly does draw lines for entitlement in order to allocate limited funds to competing needs. These classifications do not offend due process simply because some individuals are included and other are excluded, for this is the very nature and purpose of the conditions of entitlement. *Flemming* v. *Nestor, supra.*

The durational provision is not invalid because it may deny benefits to some persons whose marriage was not contracted to obtain benefits. "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 710–711.

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tion of the doctrine to the Social Security Act retirement benefits entitlement provision. Under the Act a wage-earner is not eligible for retirement benefits until age 62 (42 U.S.C. 402). Since the purpose of retirement benefits is the replacement of earnings lost through retirement, the age 62 requirement could be viewed as a "conclusive presumption" that no individual loses earnings through retirement before age 62. If the provision is so characterized, it is invalid since the "presumption" is "not necessarily or universally true in fact."

All that is required is that the classifications so drawn have some rational basis. The duration-of-marriage requirement has such a basis and thus satisfies due process requirements.

The "conclusive presumption" doctrine is contrary to the traditional standard of review which this Court has applied to the Social Security Act (see pp. 7–8, *supra*). If applied to the Act, the doctrine would result in the invalidation of provisions which employ standards for coverage that have a rational basis. Moreover, it would also effectively subject Congress to a "constitutional straightjacket" (*Jefferson* v. *Hackney,* 406 U.S. 535, 546) precluding legislative experimentation in areas marked by hard choices dictated by a limited amount of funds, where, this Court has observed, "[t]he very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them" (*id.* at 546–547).

C. *The Provisions At Issue Here Are Not Unconstitutional Under This Court's "Conclusive Presumption" Decisions.*

Even under this Court's "conclusive presumption" decisions, the nine-month duration-of-marriage requirement is not invalid. The legislative history of that requirement demonstrates that the provision is a prophylactic rule designed to protect the Trust Fund from claims arising from the manipulation of relationships. Congress made an allowable judgment when it adopted a general rule that nine months of marriage was a condition to obtaining benefits rather than providing for an evidentiary hearing in each case to determine the claimants' motivations for marriage. Such an in-

quiry would involve a substantial and traditionally-disfavored intrusion into protected areas of marital privacy.[12]

Moreover, requiring the Social Security Administration to proceed by hearings in all cases involving duration-of-relationship claims would entail additional administrative burdens and expense constituting a substantial drain on the Trust Fund. Cf. *Richardson* v. *Perales,* 402 U.S. 389, 406. Thus, there is not here, as there was in *Vlandis* v. *Kline, supra,* 412 U.S. at 452, a "reasonable alternative means of making the crucial determination."

II. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY INSOFAR AS IT SEEKS RETROACTIVE BENEFITS

Insofar as it seeks retroactive benefits, this suit is one against the sovereign because "the judgment sought would expend itself on the public treasury" (*Land* v. *Dollar,* 330 U.S. 731, 738, quoted with approval in *Dugan* v. *Rank,* 372 U.S. 609, 620; *Hawaii*

[12] Appellees have suggested by analogy to 42 U.S.C. 416(k) that the Secretary could hold a hearing to determine whether it was reasonable to expect that the wage earner would live for nine months at the time of the marriage. If, as appellees maintain, the purpose of the statute is to identify marriages motivated by a desire to obtain benefits, then the motivations to marry must be the object of the hearing; otherwise the procedure appellees suggest would itself contain a "conclusive presumption", *viz.*, that any marriage which occurs less than nine-months before a wage earners' *expected* death was motivated by a desire to obtain benefits. Put another way, a claimant denied benefits because of husband's death was concededly imminent at the time of marriage could attack the statute as a "conclusive presumption" on the ground that it denies her the right to prove that in marrying she was not motivated by the availability of benefits.

v. *Gordon,* 373 U.S. 57, 58). Thus, unless Congress has explicitly waived sovereign immunity or this claim comes within a judicial exception to the doctrine, this suit cannot be maintained. Neither condition exists here.

The only congressional waiver of sovereign immunity is 42 U.S.C. 405(g).[13] That section is inapplicable here, however, since it provides for judicial review only "after any final decision of the Secretary made after a hearing" where review was sought within 60 days after the Secretary's final decision. This suit was not brought under Section 405(g) and the district court sustained jurisdiction only under 28 U.S.C. 1331. Section 1331 is not a waiver of sovereign immunity, but merely defines the kinds of cases over which the district courts have jurisdiction. See, *e.g., Beale* v. *Blount,* 461 F. 2d 1133, 1138 (C.A. 5); *Cotter Corporation* v. *Seaborg,* 370 F. 2d 686, 692 (C.A. 10).

Although sovereign immunity does not bar suit where an officer is acting pursuant to an unconstitutional statute, or beyond his statutory powers (*Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 691 n. 11, 701–702; *Malone* v. *Bowdoin,* 369 U.S. 643, 647), these exceptions do not permit a suit which would require payment of the sovereign's funds. *Larson, supra,* 337 U.S. at 691, n. 11.

[13] The other jurisdictional bases alleged in appellees' complaint (the Administrative Procedure Act, 28 U.S.C. 1361, 28 U.S.C. 1343(1), and the Fifth Amendment) do not waive sovereign immunity for purposes of recovery of retroactive benefits. In any event, the district court never considered these jurisdictional bases. Cf. *Richardson* v. *Morris,* 409 U.S. 464. Moreover, as stated above, 42 U.S.C. 405(g) is the exclusive jurisdictional base for recovery of benefits under the Act. See 42 U.S.C. 405(h).

That principle was recently reaffirmed in *Edelman* v. *Jordan*, 415 U.S. 651. *Edelman* was a class action against Illinois state officials to recover, *inter alia*, retroactive benefits under Aid to the Aged, Blind, and Disabled (AABD),[14] which had been withheld from class members when the state failed to comply with federally-imposed timetables for processing applications. This Court reversed the portion of the court of appeals' decision that permitted recovery of retroactive benefits against the State.[15] Rejecting the plaintiffs' argument that such payments amounted to "'equitable restitution'," the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (415 U.S. at 668), and, therefore, were barred by the sovereign immunity principle of the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment are equally applicable to suits against the United States. See *Larson* v. *Domestic & Foreign Commerce Corp., supra,* and the dissenting opinion of Mr. Justice Frankfurter

[14] AABD is a federal-state program of assistance funded equally by the state and the Department of Health, Education, and Welfare, and administered by the state. *Edelman, supra,* 415 U.S. at 653–654.

[15] The Court indicated in *Edelman* that prospective injunctive relief was appropriate in that case (415 U.S. at 667–668) (the point was also conceded by petitioners, *id.* at 664) to compel the state officials to comply with federal regulations for the processing of applications of welfare beneficiaries. The Court suggested that prospective relief was appropriate since the monetary consequences were "ancillary" to the substantive relief. See 415 U.S. at 668. Thus, prospective injunctive relief in this case akin to that granted in *Edelman* would not be barred by sovereign immunity.

in that case, 337 U.S. at 708.[16] Insofar as this suit seeks retroactive benefits, it is barred by sovereign immunity.

III. ANY DECISION INVALIDATING THE DURATION-OF-MARRIAGE REQUIREMENT SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT.

If, contrary to our submission, this Court determines that the duration-of-marriage requirement is invalid and that sovereign immunity does not bar retroactive benefits, that decision should be given only prospective effect.[17]

This Court has long recognized that decisions holding statutes unconstitutional need not be given retroactive effect in every case. See, *e.g., Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371. In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, this Court recently indicated three factors which must be considered in deciding whether a judicial decision—including a constitutional decision—should be given only prospective effect. Those factors are: (1) whether the decision represents a clear break with past precedent, or decides an issue of first impression whose

[16] See also 3 Davis, *Administrative Law Treatise*, § 27.02, p. 548, n. 1 (1958 ed.):

"The Eleventh Amendment creates sovereign immunity of states in certain suits in the federal courts.

"No difference is discernible in modern law between suits against states in the federal courts, and suits against the United States in federal courts. * * *"

[17] The State of Illinois also argued this point in *Edelman* v. *Jordan*, but this Court declined to reach the issue in light of its disposition on the grounds of sovereign immunity. 415 U.S. at 658–659, n. 7.

resolution was not clearly foreshadowed; (2) whether retroactive effect will promote the policies underlying the decision; and (3) whether the retroactive application will produce "substantial inequitable results." *Id.* at 106–107.

Under the tests of *Chevron Oil,* any decision invalidating the duration-of-marriage requirement should be given only prospective effect.

1. The "conclusive presumption" doctrine represents a radical departure from this Court's prior decisions concerning the standard of review of Social Security Act classifications (see pp. 7–8, *supra*). Since the traditional standard of review was applied by this Court in its most recent decision involving the Social Security Act (*Jimenez* v. *Weinberger,* No. 72–6609, decided June 19, 1974), the application of the "conclusive presumption" doctrine has not been foreshadowed by prior decisions.

2. The payment of retroactive benefits is not necessary to promote the purposes of the Act. Presented with an analogous situation in *Rothstein* v. *Wyman,* 467 F. 2d 226 (C.A. 2), certiorari denied, 411 U.S. 921, the Second Circuit applied the *Chevron Oil* factors and concluded that the State of New York should not be required to pay retroactive benefits illegally withheld from AABD recipients. The factors which led the court of appeals to deny retroactive benefits in *Rothstein* are also present here.

This is not a case where retroactive benefits are arguably justified to deter officials from calculated and flagrant violation of law. (Compare *Edelman,*

supra, 415 U.S. at 691–692, dissent of Mr. Justice Marshall.) Here, the Secretary acted in compliance with an Act of Congress which he believes to be constitutional. Moreover, payment of large lump sums of retroactive benefits does not advance the purposes of the monthly survivors benefits provisions of the Social Security Act which were designed to provide continuing support. See p. 11, *supra.* As the *Rothstein* court noted, the unfortunate consequences of that lost support "however deplorable, cannot be undone." 467 F. 2d at 234.

3. Finally, the payment of retroactive benefits would produce an inequitable result from the standpoint of operation of the Trust Fund. In this case lump sum retroactive benefits would be paid to many people no longer entitled to prospective relief because they had attained age 18, remarried, or otherwise become ineligible. Funds thus expended would not be available for payment to individuals now qualified for statutory benefits. Cf. *Rothstein* v. *Wyman, supra,* 467 F. 2d at 234.

IV. CLASS ACTION ISSUES

As set forth in our Jurisdictional Statement (pp. 12–14), the district court erred in its handling of the class suit issues in this case. Specifically, the district court's action is certifying the class and ordering the sending of notice *after* judgment is contrary to the requirements of Rule 23, Fed. R. Civ. P., and this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156.[18]

[18] Contrary to appellees' contention (motion to affirm, p. 29), the government did not waive any defects in the court's treat-

To the extent this suit seeks equitable prospective relief, *i.e.*, insofar as it challenges the constitutionality of the durational provisions, the class action issues referred to above are irrelevant since, however this Court decides the merits of this case, the decision will be binding on both the Secretary and all claimants under the Act.

Class action issues are relevant only if this Court determines that the durational provision is invalid and that there may be recovery of retroactive benefits. In that event, the district court's definition of the class must be modified to permit recovery of retroactive benefits only by persons who have satisfied the conditions of 42 U.S.C. 405(g), *i.e.*, obtaining a final denial of their claim by the Secretary after a hearing and filing suit within 60 days of the final denial.

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ment of the class action issue by stipulating that the case could be decided on summary judgment. The stipulation stated only that "[t]here are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision * * *" (App. 29). In any event, the court's obligation to make an early determination of the class and to require sending notice to class members does not depend on the action or inaction of a defendant.

The sending of notice after judgment is simply ineffective. Had the government prevailed below, the decision would not have bound class members who were not given notice and an opportunity to opt out of the suit. We decline to press the notice issue at this point only because the *stare decisis* effect that this Court's decision will, as a practical matter, bind all claimants under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

42 U.S.C. 405(g) provides:

Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only

the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. 405(h) provides:

Finality of Secretary's decision.

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

42 U.S.C. 416(c) provides:

Widow.

The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (c), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45.

42 U.S.C. (Supp. II) 416(e) provides:

Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not

less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or

(ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. (Supp. II) 416(k) provides:

Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.

The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's

child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

(Continued on inside front cover)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED i

QUESTIONS PRESENTED 2

SUMMARY OF ARGUMENT 3

ARGUMENT [CONSTITUTIONAL QUESTION]

I. THE PURPOSE OF THE SOCIAL SECURITY ACT PROVISIONS INVALIDATED BELOW

A. The Nine Month Conclusive Presumption Was Established to Exclude Short-Term Sham Marriages Entered Into in Expectation of the Wage Earner's Imminent Death 6

B. Congress did not Intend to Exclude Benefit Applications Based Upon a Genuine Permanent Marital Relationship Motivated by Economic Considerations Even Including the Possibility of Obtaining Survivorship Benefits 8

C. Congress Did Not Devise the Nine-Month Conclusive Presumption as a Test of Whether the Widow and Child had Become Economically Dependent Upon the Wage Earner Before His Death 9

II. A CONCLUSIVE PRESUMPTION THAT A MARRIAGE TERMINATED BY DEATH THROUGH ILLNESS WITHIN NINE MONTHS WAS A SHAM ENTERED INTO FOR THE PURPOSE OF FRAUDULENTLY OBTAINING SURVIVORSHIP BENEFITS IS UNCONSTITUTIONAL

A. The Nine-Month Conclusive Presumption of Sham Marriage Contracted in Contemplation of Death is not Universally True 12

Page

B. Reasonable Alternative Means are Easily Available to Determine Whether the Marriage was Actually a Sham Entered Into for the Purpose of Obtaining Survivorship Benefits After the Wage Earner's Expected Imminent Death 14

C. The Nine-Month Conclusive Presumption is Wholly Evidentiary and Does not Serve the Substantive Purpose of Deterring Sham Marriages Motivated by the Desire to Fraudulently Qualify for Survivorship Benefits 16

III. THE CONCLUSIVE PRESUMPTION DOCTRINE APPLIES TO THE SOCIAL SECURITY ACT JUST AS IT APPLIES TO ANY OTHER LEGISLATIVE ENACTMENT 16

IV. THIS COURT SHOULD REAFFIRM IN THIS CASE THE DOCTRINE THAT CONCLUSIVE PRESUMPTIONS ARE UNCONSTITUTIONAL UNLESS UNIVERSALLY TRUE 18

V. THE NINE-MONTH CONCLUSIVE PRESUMPTION IS SO FANTASTICALLY OVER-BROAD AS TO DEPRIVE THE SALFIS AND THOSE SIMILARLY SITUATED OF EQUAL PROTECTION 24

ARGUMENT [SOVEREIGN IMMUNITY] 29

I. BY ENACTING 42 U.S.C. § 405(g), CONGRESS HAS CONSENTED TO SUITS FOR SOCIAL SECURITY BENEFITS UNDER THAT SECTION AND/OR OTHER SOURCES OF JURISDICTION WITHOUT EXHAUSTION OF THE ADMINISTRATIVE REMEDY WHEN THIS IS REFUSED BY SSA 32

Page

II. SOVEREIGN IMMUNITY DOES NOT BAR A JUDGMENT WHICH MERELY REQUIRES FEDERAL OFFICERS AND AGENCIES TO CEASE VIOLATING THE CONSTITUTION AND TO CORRECT THE EFFECTS OF PAST VIOLATION 36

III. SOVEREIGN IMMUNITY IS INAPPLICABLE INSOFAR AS THE JUDGMENT BELOW ONLY EFFECTUATES SSA'S OWN REGULATION REQUIRING THE PAYMENT OF RETROACTIVE BENEFITS 41

IV. SOVEREIGN IMMUNITY IS NOT A DEFENSE TO LITIGATION UNDER THE OTHER SOURCES OF JURISDICTION RELIED UPON BY THE SALFIS 42

V. A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR ITS IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL 45

ARGUMENT [APPROPRIATENESS OF RETROSPECTIVE APPLICATION] 46

ARGUMENT [CLASS ACTION ISSUES] 50

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Bartly v. Finch, 311 F.Supp. 876 (E.D. Ky. 1970) 32

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 43

Brown v. Allen, 344 U.S. 433 30

	Page
Carrington v. Rash, 380 U.S. 89 (1964)	25
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	5, 46
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	12, 19, 20
Commonwealth of Pennsylvania v. Lynn, 362 F.Supp. 1363 (D. D.C. 1973)	45
Constructores Civiles de Centro-America v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972)	43
Diaz v. Weinberger, 361 F.Supp. (S.D. Fla. 1973)	32
Doe v. Swank, 332 F.Supp. 61 aff'd. 404 U.S. 987	48
Edelman v. Jordan, 415 U.S. 651 (1974)	4, 38, 39, 48
Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974)	50
Eisenstadt v. Baird, 405 U.S. 438 (1972)	27
Estrada v. Ahrens, 296 F.2d 690 (5 Cir. 1961)	44
Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6 Cir. 1968)	8
Flemming v. Nestor, 363 U.S. 603 (1960)	17, 47
Gaddis v. Wyman, 304 F.Supp. 717 aff'd. 397 U.S. 94	48
Gainville v. Richardson, 319 F.Supp. 16 (D. Mass. 1970)	32
Gilliard v. Craig, 331 F.Supp. 587, aff'd. 409, U.S. 807	48
Griffin v. Richardson, 346 F.Supp. 1226, aff'd. 409 U.S. 1969 (1972)	39
Grubb v. Sterrett, 315 F.Supp. 990, aff'd. 404 U.S. 922	48
Hagans v. Lavine, 415 U.S. 528 (1974)	35
Hamilton v. Board of Regents, 293 U.S. 245	17
Heiner v. Donnan, 285 U.S. 312 (1932)	19, 47

	Page
Honda v. Clark, 386 U.S. 484 (1967)	34
Hurn v. Oursler, 289 U.S. 238 (1933)	35
Jefferson v. Hackney, 406 U.S. 535, 546 (1972)	21
Jimenez v. Weinberger, 417 U.S. 628 and 640	19, 28
Johl v. United States, 370 F.2d 174 (9 Cir. 1966)	8
Johnson v. Robison, 415 U.S. 361 (1974)	30, 33
Jordan v. Weaver, 472 F.2d 985 (7 Cir. 1973)	48
Kendall v. United States, 37 U.S. (12 Pet.) 522 (1838)	34
Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2 Cir. 1973)	43
Klatscha v. Driver, 411 F.2d 436 (2 Cir. 1969)	44
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949)	36, 37
Littell v. Morton, 445 F.2d 1207 (4 Cir. 1971)	37, 44
Local 2677, AFGE v. Phillips, 358 F.Supp. 60 (D. D.C. 1973)	45
Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928)	23
Lutwak v. United States, 344 U.S. 604 (1953)	7, 14
McKart v. United States, 395 U.S. 185 (1969)	33-34
McNeese v. Board of Education, 373 U.S. 668 (1963)	39
Miguel v. McCarl, 291 U.S. 442 (1934)	38, 44
Mobile, J. & K. C. Ry. v. Turnipseed, 219 U.S. 35, 44 (1910)	19
Morton v. Ruiz, 415 U.S. 199 (1974)	39, 41
Mulry v. Driver, 366 F.2d 544 (9 Cir. 1966)	44
National City Bank v. Republic of China, 348 U.S. 356 (1955)	40-41
North American Co. v. Securities & Exchange Commission, 327 U.S. 686 (1946)	26

Page

Oestereich v. Selective Service Board, 393 U.S. 233 (1969) 34

Parisi v. Davidson, 405 U.S. 34 (1972) 33-34

Reed v. Arlington Hotel Company, Inc., 476 F.2d 721 (8 Cir. 1973) 50

Rhodes v. Weinberger, C.A. No. 74-1511 (E.D. Penn. 1975) printed as App. 32, 41

Richardson v. Belcher, 404 U.S. 78 (1971) 17

Rinaldi v. Yeager, 384 U.S. 305 (1966) 27

Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900) 38, 44

Rockbridge v. Lincoln, 449 9 F.2d 567 (9 Cir. 1971) 45

Rodriguez v. Swank, 318 F.Supp. 289 aff'd. 403 U.S. 901 48

Rothstein v. Wyman, 467 F.2d 226 (2 Cir. 1972) 47

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 17

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) 44

Scheuer v. Rhodes, 416 U.S. 232 (1973) 30

Schlesinger v. Wisconsin, 270 U.S. 230 (1926) 19

Schneider v. Rusk, 377 U.S. 163 (1964) 29

Stanley v. Illinois, 405 U.S. 645 (1972) 19-20, 21

State Highway Commission v. Volpe, 479 F.2d 1099 (8 Cir. 1973) 45

State of Washington v. Udall, 417 F.2d 1310 (9 Cir. 1969) 37

Stell v. Savannah-Chattham Board of Education, 333 F.2d 55 (5 Cir. 1964) 50

Thompson v. Shapiro, 270 F.Supp. 331 aff'd. 394 U.S. 618 48

Page

Turner v. Kings River Conservation District, 360 F.2d 184 (9 Cir. 1966) 37

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 35

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 27

United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) 12, 17, 21, 39, 47

United States v. Jefferson County Board of Education, 380 F.2d 385 (5 Cir. 1967) 50

Village of Belle Terre v. Boraas, 416 U.S. 1, (1974) 22-23

Vlandis v. Kline, 412 U.S. 441 (1973) 12, 17

Weinberger v. Wiesenfeld, Oct. Term 1974, No. 73-1892 31

Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981 (D. N.J. 1973) 31, 32

Williams v. Richardson, 347 F.Supp. 544 (W.D. N.C. 1972) 32

Wilwording v. Swenson, 404 U.S. 249 (1971) 30

Zarate v. State Department of Health & Rehab. Services, 347 F.Supp., 1004 aff'd. 407 U.S. 918 48

Statutes & Regulations:

20 C.F.R. § 404.957 ..... 5, 42

Administrative Procedure Act. 5 U.S.C. §§ 702, et seq. 35, 42

28 U.S.C. § 1331 ..... 2, 30, 31, 35, 42

28 U.S.C. § 1343 ..... 2, 30, 42

28 U.S.C. § 1361 ..... 2, 30, 35, 42, 44

42 U.S.C. § 402 10

42 U.S.C. § 405 ..... 2, 4, 30, 31, 32

42 U.S.C. § 416(k) 7, 9, 15

42 U.S.C. § 1983 43

	Page
42 U.S.C. § 1985	42, 43
F.R. Civ. P., Rule 23(b)(2)	50
F.R. Civ. P., Rule 23(b)(3)	50
Legislative History:	
House Ways & Means Committee Report, 3 U.S. Cong. News & Admin. Reports, 5042 (1972)	6
Senate Finance Committee Report, 2 U.S. Cong. News & Admin. Reports, 2933 (1967)	6
Commentaries:	
Block, *Suits Against Government Officers*, 59 Harv. L. Rev. 1060	40
Crampton, *Non-Statutory Review of Federal Administrative Action*, 68 Mich. L. Rev. 387	40
Davis, *Administrative Law Treatise*	40
Jaffe, *Judicial Control of Administrative Action*	37
Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1	37
Tussman and TenBroek, "The Equal Protection of the Laws", 37 Cal. L. Rev. 341 (1948)	26

IN THE

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OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether the statutory provisions invalidated below[1] are a conclusive presumption which deprive appellees[2] of Due Process?

2. Whether the nine-month conclusive presumption is an arbitrary and unreasonable classification which violates the Fifth Amendment?

3. Whether sovereign immunity bars an award which requires federal officials[3] to correct the past effects of the enforcement of an unconstitutional statute?

4. Whether 42 U.S.C. 405(g)'s waiver of sovereign immunity as to suits for Social Security benefits applies to suits in which the administrative remedy also provided by that section was not exhausted because it can not resolve constitutional claims?

5. Whether, in the circumstances of this case, and in light of their legislative history, sovereign immunity should be held to bar actions arising directly under the United States Constitution, or under 28 U.S.C. §§1331, 1343, 1361 or the Administrative Procedure Act?

6. Whether this case exhibits the extraordinary characteristics which justify departure from the normal expectation that judicial decisions will have retrospective application?

[1]Title 42 U.S.C. 416(c)(5) and (e)(2), hereinafter jointly denominated "the nine-month conclusive presumption."

[2]Appellees, respectively the widow and stepdaughter of the late Londo L. Salfi, are hereinafter denominated "the Salfis."

[3]Appellants, who include the Department of Health, Education and Welfare and various of its employees and those of the Social Security Administration, are hereinafter jointly denominated "SSA."

7. Whether SSA waived whatever class action objections it might have had when it mapped out the certification procedure, and stipulated to the class allegations of the complaint, to which it subsequently objected only after the substantive issues were decided to adversely do it?

SUMMARY OF ARGUMENT

Conclusive Presumption Argument: Title 42 U.S.C. §416(c)(5) and (e)(2) erect a conclusive presumption that where a wage earner dies of natural, non-accidental causes within nine months after his marriage, that marriage was a sham entered into in contemplation of his death for the purpose of qualifying his widow for Social Security survivorship benefits. A conclusive presumption violates Due Process unless: (1) the presumed facts are universally true; or (2) no reasonable alternative exists for individualized determination of the actual facts; or (3) the statute really represents a substantive rule of law rather than a purely evidentiary presumption. None of these factors is present here, for: (1) in the vast majority of cases, a bridegroom's death through heart attack or other illness within nine months after marriage is a wholly unforeseen calamity rather than the denouement of a conspiracy entered into in knowledge that he was terminally ill; (2) reasonable alternative means exist for individualized determination of the actual facts, most notably the accessibility of proof as to the health and life expectancy of the wage earner prior to marriage; (3) in light of its history and the surrounding legislative scheme, no substantive policy

purpose can be (or has been) realistically suggested for the nine-month conclusive presumption.

Equal Protection Argument: The nine-month conclusive presumption denies Equal Protection in that it is both incredibly overinclusive and substantially underinclusive. The statute is overinclusive in that the vast majority of applications it excludes are based upon the wholly unexpected death of the wage earner within nine months of marriage, rather than sham marriages. It is an underinclusive classification in that benefits are available to the "survivor" of a sham marriage if the wage earner manages to hang on for nine months or more.

Sovereign Immunity Argument: Sovereign immunity should not be held to bar a judgment nullifying the effects of an unconstitutional statute. Unlike the 11th Amendment with which *Edelman v. Jordan*, 415 U.S. 651 deals, federal sovereign immunity is a wholly judicial construct. As such it is subject to abrogation or limitation by this Court in light of modern jurisprudential thought which uniformly regards sovereign immunity as a grotesque anarchronism. Moreover, SSA's purported sovereign immunity argument is really a convoluted and unmeritorious claim that an administrative remedy was not exhausted. By enacting 42 U.S.C. §405(g) Congress has waived sovereign immunity from suits for Social Security benefits. SSA contends that waiver is inapplicable to this case because the administrative remedy provided in §405(g) was not exhausted–even though SSA would (and did) refuse to decide the constitutional claims involved in this case. SSA has suffered no detriment from the failure to exhaust administrative remedies, and it should be held

that §405(g) waives sovereign immunity without such exhaustion where the remedy is in fact unavailable or refused.

Appropriateness of Retroactive Benefits: This case does not have the extraordinary characteristics which *Chevron Oil Co. v. Huson*, 404 U.S. 97 cites as overriding the normal expectation of retrospective application of judicial decisions. There is nothing novel about either the conclusive presumption doctrine or its application to the Social Security Act. Far from being inconsistent with retroactive benefits, the Social Security Act (as implemented by SSA's own regulations) provides for them in cases of erroneous benefit denial. 20 C.F.R. §404.957. The ordered reexamination of the class' benefit applications would not deplete the Trust Fund since Congress can simply appropriate additional money into it to cover the additional number of recipients. This is something which is required whenever circumstances result in an influx of benefit applications beyond those anticipated in the yearly appropriations which Congress votes according to SSA's estimates.

Class Action Issues: SSA appears no longer to press any disputed class action issues. The parties seem agreed that the judgment below properly binds both the class and SSA, requiring the latter to give notification to all persons previously denied benefits of their entitlement to reapply for prospective benefits. (SSA maintains its objections to *retroactive* class relief, but these apparently rest solely upon sovereign immunity, rather than class action, grounds.) In any event, SSA waived all class action objections below when it helped map out the certification procedure (and stipulated to the class action allegations of the Complaint) to which it subsequently objected only after the substantive issues were decided adversely to it.

ARGUMENT [CONSTITUTIONAL QUESTION]

I.

THE PURPOSE OF THE SOCIAL SECURITY ACT PROVISIONS INVALIDATED BELOW.

A. The Nine Month Conclusive Presumption Was Established to Exclude Short-Term Sham Marriages Entered Into in Expectation of the Wage Earner's Imminent Death.

The nine-month conclusive presumption is part of a comprehensive legislative scheme devised against the possibility that a terminally ill wage earner might offer, or be induced, to enter into a sham marriage to make the woman (and any children she might have of a former marriage) eligible for survivorship benefits after his death.[1] Thus, where the wage earner dies of an

[1]The legislative purpose is apparent not only from the statutory scheme, but from explicit statements to be found in the 1967 Senate Report which accompanied the enactment of the challenged provisions of §416 and the 1972 House Report which accompanied the enactment of certain amendments to that section. The latter report is quoted in the opinion below (J.S. App. p.5a), while the former, which is almost identically worded, is quoted at p.2, n.1 of plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (etc.) in the court below. That quotation is taken from p. 2933 of the 1967 U S. Cong. News & Admin. Rep. (v.2).

SSA's Opening Brief, pp. 8-9 and n.5 cites, but does not quote, apparently similar statements of intent from testimony before the Congress of 1938 which originally enacted a one-year conclusive presumption which was the predecessor of the provisions here challenged. Although, as will appear, SSA may

(footnote continued)

illness or disease (or other non-"accidental" cause) within nine months after marriage, the nine-month conclusive presumption bars his widow and/or stepchildren from receiving survivorship benefits. Under another sub-section of §416, this nine-month rule is inapplicable if the wage earner's death was "accidental."[2] But even where the death was accidental, survivorship benefits are not available if HEW "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months."

Both Congress and this Court are familiar with instances in which persons entered into temporary sham marriages in order to qualify for benefits which Congress has provided as an incentive (or at least made available) to genuine marriage. *See e.g. Lutwak v. United States*, 344 U.S. 604, 611 dealing with the attempt to counterfeit marriages between aliens and United States citizens in order to secure American residency for the former. In defining the essence of the fraud there involved, the opinion compares "fake marriages in which neither of the parties ever intended to enter into the marital relationship . . . and were never to live together as husband and wife" to "the common understanding of a marriage, which Congress must have

construe the purpose of these provisions somewhat more broadly than do the Salfis, it is agreed that, at the very least, they were intended to exclude fraudulent applications based upon sham marriages entered into in contemplation of the wage earner's imminent death.

[2]Title 42 U.S.C. 416(k) which defines an "accidental" death as one caused "solely through violent, external and accidental means."

had in mind when it made provisions for 'alien *spouses*' in the War Bride's Act [which] is that the two parties have undertaken to establish a life together and assume certain duties and obligations." (Emphasis in original). This Court went on to rephrase and cite with approval the holding of a lower court case that, whatever the legal formality, there is in fact no marriage where "there was no good faith—no intention to marry and consummate the marriage even for a day."[3]

B. Congress did not Intend to Exclude Benefit Applications Based Upon a Genuine Permanent Marital Relationship Motivated by Economic Considerations Even Including the Possibility of Obtaining Survivorship Benefits.

Although generally concurring in the foregoing analysis, certain ambiguous language in SSA's Opening Brief may be intended to suggest that the nine-month conclusive presumption has an even broader purpose: To exclude not only sham marriages, but even long-term genuine marriages entered into without knowledge that the wage earner was terminally ill if the marriage was motivated by the possibility of eventually securing survivorship benefits. This is to make the rather unlikely assertion that Congress, having provided

[3]344 U.S. at 613. See also Johl v. United States, 370 F.2d 174 (9 Cir. 1966) (marriage undertaken to secure alien's American residency; marriage never consumated and parties never cohabited) and Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6 Cir. 1968) (marriage undertaken to secure alien's American residency; marriage never consumated although alien did temporarily reside—on couch—in the house which his "wife" shared with her paramour).

certain benefits, sought to bar those who sought fully and genuinely to meet the eligibility requirements. No reason (other than the talismanic phrase "to protect Trust Fund") is given to explain why a legislative body which has repeatedly provided economic incentives for genuine marriage would seek in this situation to exclude those who had been influenced by such considerations in deciding to marry.

More important, no reason is given why, if this is the purpose, the nine-month conclusive presumption is not applied where the wage earner's death was "accidental." The obvious reason for this difference in treatment—that an accidental death is not foreseeable while a death through illness may be—demonstrates that the congressional intent was to bar applications based upon marriages which were entered into as temporary expedients in contemplation of the wage earner's imminent death. This intent is made express by §416(k)'s prohibition of survivorship benefits even in accidental death cases where HEW "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months."

C. Congress Did Not Devise the Nine-Month Conclusive Presumption as a Test of Whether the Widow and Child had Become Economically Dependent Upon the Wage Earner Before His Death.

Departing entirely from anything in the legislative history, SSA attempts to justify the nine-month conclusive presumption as a test of whether the wife

and/or stepchildren have become dependent upon the wage earner. That a nine-month hiatus might have been adopted for this purpose seems superficially plausible until attention is again turned to the fact that the nine-month conclusive presumption does not apply if the death was accidental. Surely Congress did not believe that whether and to what extent a wage earner's wife and/or stepchildren become dependent upon him after marriage turns upon the causation of his death.

Moreover, the dependency rationale is inconsistent with both the general theory and specific other provisions of the Social Security Act. As applied to children or stepchildren, the dependency rationale would render the nine-month conclusive presumption a redundancy, since Congress has chosen to directly test a child's economic dependency by making it an eligibility requirement which the child must satisfactorily prove before receiving benefits.[4] On the other hand, it has never been the policy of the Social Security Act to impose any test of dependency for widows. Far from requiring dependency of a wage earner's surviving wife, Social Security provides survivorship benefits where, at the time of his death, his wife's earnings or property exceed his own or even where the wage earner was entirely dependent upon her support. Obviously, if Congress had wished (contrary to the previous policy of the Act) to test a widow's dependency, it could have adopted, as it had for children, stepchildren and

[4]Title 42 U.S.C. §402(d) reads in pertinent part: "Every child (as defined in §416(e) of this title) of . . . an individual who dies a fully or currently insured individual [is eligible for survivor's benefits] . . . if such child, . . . (C) was dependent upon such individual. . . .

divorced ex-wives,[5] the simple, obvious and direct means of requiring actual proof of such dependency as a condition of eligibility rather than by imposing an inefficient nine-month conclusive presumption.

Finally, a nine-month hiatus to establish economic dependency is irrational since if a woman and/or her children by a former marriage become dependent upon a new spouse at all, they generally do so at the time of the marriage. If the dependency results from a cessation of welfare, alimony, child support or pension rights, this occurs at the time of marriage. If, on the other hand, dependency arises because the wife voluntarily leaves her employment, this most probably occurs before the wedding and honeymoon, as a result of premarital discussion between the marriage partners. In any case, a presumption that a widow and/or stepchildren do not become dependent upon the new spouse for nine months after marriage is itself an evidentiary conclusive presumption, subject to the constitutional limitations applicable to such presumptions. Since a presumption that dependency does not occur for nine months is by no means universally true—indeed, in at least the majority of instances would be untrue—such a presumption is constitutionally defective. See discussion, *infra*.

[5]In contradistinction to the situation of a widow, until recently dependency was an explicit eligibility requirement as to the *divorced ex-wife* of a deceased wage earner. Former U.S.C. §402(b)(1)(d), read, in pertinent part: "[A divorced wife is entitled to benefits, if she] . . . was receiving at least one-half of her support as determined in accordance with regulations prescribed by the Secretary [of HEW], from such individual, or was receiving substantial contributions from such individual (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from such individual. . . ."

II.

A CONCLUSIVE PRESUMPTION THAT A MARRIAGE TERMINATED BY DEATH THROUGH ILLNESS WITHIN NINE MONTHS WAS A SHAM ENTERED INTO FOR THE PURPOSE OF FRAUDULENTLY OBTAINING SURVIVORSHIP BENEFITS IS UNCONSTITUTIONAL.

Numerous decisions of this Court have established that legislation which presumes evidentiary facts without possibility of rebuttal is unconstitutional if: (1) the presumed facts are not universally true; (2) reasonable alternative means exist for the determination of the actual facts; and (3) the statute is wholly evidentiary, serving no substantive policy purposes. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) and cases there cited. *See also United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

A. The Nine Month Conclusive Presumption of Sham Marriage Contracted in Contemplation of Death is not Universally True.

SSA has studiously refrained even from suggesting that the marriages of which the Salfis and those similarly situated are survivors were sham or fraudulent. On the contrary, SSA has stipulated that the Salfi marriage was genuine in every respect, that medical examination had shown Mr. Salfi to be in perfect health

at the time of the marriage and that his death from heart failure some six months later was entirely unexpected.[6] SSA has not adduced any evidence as to the incidence of sham marriages concocted to obtain survivorship benefits nor has it referred to congressional hearings or findings which would show that the anticipated danger is more than merely speculative.

In contrast to this hypothetical danger of fraud, it is common knowledge that each year thousands of apparently perfectly healthy American men in their 50's, 40's, 30's and even 20's die suddenly and wholly unexpectedly of heart failure or other illnesses. It is apparent, therefore, that the nine-month conclusive presumption is not only *not* universally true, but is erroneous in the majority of cases. Indeed, in view of SSA's failure to attempt to establish any incidence whatever of sham marriages, it must be assumed that

[6]Attached to the Complaint below was an affidavit of Mrs. Salfi setting out in detail the facts as to her courtship and marriage to Mr. Salfi and his subsequent death. SSA stipulated below (see Appendix p. 29, paragraph 2) to the factual accuracy of that affidavit and of paragraph 11 of the Complaint, which reads, in pertinent part:

> "That Mr. Salfi's death from heart failure was entirely unexpected and unforseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarily determined) of another 21 years of life; that plaintiff [Mrs. Salfi] and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together."

the haphazard operation of the nine-month conclusive presumption disallows hundreds (perhaps thousands) of genuine applications each year for every one fraudulent application.[7]

B. Reasonable Alternative Means are Easily Available to Determine Whether the Marriage was Actually a Sham Entered Into for the Purpose of Obtaining Survivorship Benefits After the Wage Earner's Expected Imminent Death.

SSA suggests that practical (and perhaps constitutional-privacy) considerations would make it impossible to determine whether a marriage was genuine or a sham. But this is by no means true as a long line of cases in the immigration area dealing with sham marriages illustrate.[8] Moreover, the problems of proof are immensely simplified because the objective is not to identify the intent behind genuine marriages, but rather

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[7]Since there are no reliable figures available, the Salfis have not attempted to delineate the precise number of persons affected by the nine-month conclusive presumption. In an affidavit from a Social Security employee, SSA estimates (on what basis it is not clear) that approximately 20,000 claims for survivorship benefits have been rejected in the six years in which the nine-month conclusive presumption has been in operation. *Affidavit of Russell F. Davis,* attached to SSA's Motion for Reconsideration, below.

[8]See Lutwak v. United States, *supra,* and the cases cited at note fn. 3, *supra.*

to exclude sham marriages entered into in contemplation of the wage earner's imminent death. Obviously, a marriage could only be contracted in that expectation if it were known that the wage earner was terminally ill. It must be assumed that in the majority of cases falling under the nine-month conclusive presumption, the wage earner was not known to be terminally ill at the time of marriage and the applicant for survivorship benefits must be allowed to demonstrate this. Such a demonstration could be made by affidavit (*e.g.* of the wage earner's physician) or documentary medical evidence, without even the necessity of a formal hearing procedure. Congress has implicitly recognized that determining the facts in this manner would not impose an inordinate administrative burden by enacting subsection (k) of §416 which requires SSA to determine whether "at the time of the marriage involved [a wage earner] could not have reasonably been expected to live for nine months.[9]

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[9]In a remarkable feat of advocacy, SSA turns the Salfi's argument upside down and accuses them of proposing a conclusive presumption that "any marriage which occurs less than nine months before a wage earner's [sic]*expected* death was motivated by desire to obtain benefits." Opening Brief, n.12, emphasis in original. The Salfis' argument does not suggest what inferences might be drawn as to genuineness of a marriage from the fact that it was entered into in expectation of death. The Salfis are, rather, concerned with the opposite situation and their argument consists of no more than the self-evident proposition that a marriage could not have been entered into as a short-term expedient in contemplation of the wage earner's imminent death if in fact he was not known to be terminally ill at the time of the marriage.

C. The Nine-Month Conclusive Presumption is Wholly Evidentiary and Does not Serve the Substantive Purpose of Deterring Sham Marriages Motivated by the Desire to Fraudulently Qualify for Survivorship Benefits.

SSA attempts to categorize the nine-month conclusive presumption as a *deterrent* to short-term sham marriages entered into to qualify for benefits rather than simply a way of detecting and dealing with such situations. The nine-month conclusive presumption imposes no penalty for attempting to obtain benefits through a sham marriage and its operation is so haphazard that it provides no deterrent whatsoever. Parties who might consider entering into a short-term sham marriage know that benefits will automatically be available if the terminally ill wage earner can hang on for nine months after the ceremony, whereas neither of them will lose anything if he does not. As SSA itself so neatly expresses it, even "a claimant who admits that the marriage was contracted to obtain benefits will receive benefits if the marriage has lasted more than nine months."[10]

III.

THE CONCLUSIVE PRESUMPTION DOCTRINE APPLIES TO THE SOCIAL SECURITY ACT JUST AS IT APPLIES TO ANY OTHER LEGISLATIVE ENACTMENT.

Citing neither reason nor authority, SSA contends that the principles established in this Court's conclusive

[10]Opening Brief, p. 10.

presumption decisions are in some very mysterious way inapplicable to the Social Security Act.[11] In fact, this Court applies the conclusive presumption doctrine to invalidate a provision of the Social Security Act just last term in *United States Department of Agriculture v. Murry*, 413 U.S. 508. SSA's attempt to distinguish *Murry* as involving an "arbitrary" conclusive presumption implicitly admits that the conclusive presumption doctrine is applicable to Social Security Act cases.[12] Moreover that characterization provides no distinction

[11]Opening Brief pp. 12-15. Much earlier in the brief, SSA cites Flemming v. Nestor, 363 U.S. 603, 611 and Richardson v. Belcher, 404 U.S. 78, 84 for the proposition that provisions of the Social Security Act are invalid "only" if they involve patently arbitrary classifications. Neither of these cases, however, involve conclusive presumptions and SSA does not appear to rely upon them as buttressing its argument that the Social Security Act is immune from the conclusive presumption doctrine.

SSA's only argument appears to be that application of the conclusive presumption doctrine might invalidate large portions of the Social Security Act. The short answer to this is that, as this Court has always recognized, a statute may be invalidated as a conclusive presumption only if it operates as an evidentiary presumption rather than a substantive rule of law. Virtually any statute could be invalidated by hypothesizing an evidentiary purpose for it and ignoring the fact that it actually represents a substantive policy decision. The Social Security Act is not unique in this respect. In the next section we shall argue that, properly applied, this Court's conclusive presumption decisions establish a salutory and quite limited rule of fundamental fairness which should be retained.

[12]See also Vlandis v. Kline, 412 U.S. 441, invalidating a statute limiting access to higher education, a privilege which has consistently been held not to represent a fundamental right. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 29-35, Hamilton v. Board of Regents, 293 U.S. 245.

whatever from the present case, since it is difficult to imagine a more arbitrary conclusive presumption than the one here involved.

IV.

THIS COURT SHOULD REAFFIRM IN THIS CASE THE DOCTRINE THAT CONCLUSIVE PRESUMPTIONS ARE UNCONSTITUTIONAL UNLESS UNIVERSALLY TRUE.

Although SSA does not call for the repudiation of this Court's conclusive presumption decisions, its suggestion that they render questionable many portions of the Social Security Act[13] is reminiscent of sharp criticisms contained in the dissents over which those decisions were rendered. Just last term, Mr. Justice Rehnquist characterized those decisions as enunciating a "still novel" doctrine which, if consistently applied, might invalidate "Congress' determination that Social Security benefits begin at a specified age", as well as minimum age requirements for voting, marriage or driving, and mandatory retirement ages for government

[13]After broadly stating that "almost every statutory entitlement provision [of the Social Security Act] can be recast as a 'conclusive presumption' ", SSA lists a number of statutes which it apparently considers prime candidates for extinguishment in that fashion. Opening Brief, p. 13 and notes 10 and 11. The list becomes somewhat less impressive when one finds that it includes three instances of the nine-month conclusive presumption, two of which are involved in this case and another being the analogous provision with regard to "widowers." SSA's other suggested statutes are largely duplicatory of the much more extensive list offered by Mr. Justice Rehnquist in several dissenting opinions which are discussed at length in the text accompanying note 15 *et seq.*

employees. *Jimenez v. Weinberger*, 417 U.S. 628, at 638 and 640; *LaFleur, supra*, 414 U.S. at 687.

Needless to say, the Salfis both urge the retention of the doctrine and deny the assertions of its critics that it threatens to eradicate the legislative power. Indeed the Salfis would even deny that there is anything "novel" about the doctrine since for almost 65 years this Court has recognized the fundamental unfairness of a conclusive presumption that something is true (when it is not true) which operates to preclude citizens from demonstrating the actual facts. *Mobile J. & K.C. Ry. v. Turnipseed*, 219 U.S. 35, 43 (1910) (dictum). *See also Schlesinger v. Wisconsin*, 270 U.S. 230 (1926) and *Heiner v. Donnan*, 285 U.S. 312 (1932) in which state and federal statutes were invalidated as unconstitutional conclusive presumptions. Nor is there any novelty in the objections now urged against the doctrine. From the earliest cases to the present, conclusive presumptions were defended as a convenient means of avoiding the administrative burden of individual fact finding. But this Court has invariably held that mere administrative convenience cannot justify legislation which arbitrarily presumes an individual into an inapplicable class and denies him the right to prove the individual facts which entitle him to a benefit or to exemption from a burden. As Mr. Justice White (speaking for the Court) said in *Stanley v. Illinois*:[14]

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. *But the constitution recognizes*

[14]405 U.S. 645, 656-657 (1972) (emphasis added; footnote omitted).

higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it implicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

We readily agree with Mr. Justice Powell's caution that conclusive presumption claims should be approached "with extreme care."[15] As SSA has demonstrated virtually any statute can be mislabelled an unconstitutional irrebuttable presumption by ignoring the fact that it serves a substantive policy and hypothecating instead a mythical evidentiary purpose for it. Nevertheless, this Court's conclusive presumption doctrine (which SSA characterizes as a "constitutional

[15] *LaFleur, supra,* 414 U.S. at 652. While indicating his concern that the conclusive presumption doctrine might be misused to encroach upon legitimate legislative enactment, Mr. Justice Powell explicitly noted his continued approval of *Vlandis* and the other cases cited *supra,* striking down enactments which, beyond peradventure, were conclusive presumptions of evidentiary fact not universally true.

straightjacket" upon the legislative process)[16] has existed for over six decades without noticeably impeding the legislative process on either federal or state levels. This long history of "peaceful coexistence" between the conclusive presumption doctrine and the legislative process is attributable to the fact that this Court has never applied the doctrine to legislation which creates a substantive rule of law, or indeed to any legislation which does not operate solely as an evidentiary presumption.[17]

In this respect it may be useful to consider SSA's suggestion that the Social Security Act's fixing of age 62 as the minimum age for receipt of old-age security (retirement) benefits, constitutes a conclusive presumption: "Since the purpose of retirement benefits is the replacement of earnings lost through retirement, the age 62 requirement could be viewed as a 'conclusive

[16] Opening Brief, p.15, quoting Jefferson v. Hackney, 406 U.S. 535, 546–an equal protection case which did not involve any reference to the conclusive presumption doctrine.

[17] Despite the fears that a uniform application of the conclusive presumption doctrine would require a wholesale invalidation of innumerable unobjectionable statutes, it is rare to find a purely evidentiary statute which cannot convincingly be argued to additionally or alternatively serve some substantive policy. Obviously the fact that no substantive policy purpose can realistically be ascribed to a statute is indicative that it is a solely evidentiary conclusive presumption. Other strong indications that a statute is solely an evidentiary conclusive presumption would include: (a) the fact that the State, in defending it against constitutional attack, admits that it is a conclusive presumption and urges that it be validated upon that ground (Stanley v. Illinois, *supra.*); (b) the fact that, as in this case, legislative committee reports describe it as a conclusive presumption; (c) the fact that legislative debate explained it as a conclusive presumption (United States v. Murry, *supra.*) and/or (d) as in this case, the fact that the legislative scheme is patently evidentiary in character.

presumption' that no individual loses earnings through retirement before age 62."[18] It would be difficult to find a clearer example of a statute enacting a substantive rule of law and lacking any vestige of evidentiary operation. Fully cognizant that some people retire before the age-range customarily considered appropriate, Congress excluded them from benefits for the substantive purpose of discouraging such retirement or at least of not subsidizing such requirement with Social Security benefits.

Mr. Justice Rehnquist's suggestion that minimum or maximum age statutes for voting, driving, etc. may be invalidated under the conclusive presumption doctrine, ignores yet another fundamental limitation upon that doctrine: Even a purely evidentiary presumption may be made irrebuttable if it represents a discretionary legislative judgment as to facts so ultimate or abstract in their nature as not to be readily subject to ordinary methods of proof and therefore not demonstrable in a hearing context. We cannot do better than to quote language of Mr. Justice Holmes which this Court (speaking through Mr. Justice Douglas) quoted with approval just last term in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 n.5 (1974):

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or a point there must be, *and that there is no mathematical or logical way of fixing it precisely*, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louiville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41. (*Emphasis added.*)

[18]Opening Brief, n.11 at p.14.

With these limitations in mind, the constitutionality of minimum age requirements for voting or marriage or of mandatory retirement statutes, becomes clear. It is apparent, for instance that a minimum age statute for voting, even if taken as a purely evidentiary presumption that those below a certain age have not the intellectual capacity to vote, would not be subject to challenge as a conclusive presumption because it rests upon a factual judgment of a kind inherently impossible to test on an individual level. We may all agree that some 16-year olds are sufficiently well developed intellectually to vote while some 20-year olds are not. But reasonable men could and would reasonably disagree as to what evidence would demonstrate sufficient intellectual capacity, what the general standards of capacity were or even how to weigh the evidence. These kinds of questions are simply not subject to individualized fact-finding.

Moreover, to each of these age-based statutes may be attributed a substantive policy purpose in addition to, or instead of, the evidentiary ones already suggested. For instance, a mandatory retirement age statute may be seen as serving the substantive economic policy of ongoing redistribution of a finite number of public employment jobs, and the income therefrom, throughout the age spectrum in an economic system in which young adults are constantly entering the labor market. Similarly, an 18-year requirement for driving can be

seen as a means of reducing road traffic (and attendant dangers of accident and pollution) by excluding those for whom driving is least economically necessary.

Far from threatening to engulf myriad desirable legislative enactments, the conclusive presumption doctrine envisioned by this Court (as opposed to that envisioned by SSA) has a severely limited scope. If restricted to evidentiary presumptions–not including presumptions which are not susceptible to quantifiable proof–that doctrine will serve only the fundamental due process purposes for which it was designed.

V.

THE NINE MONTH CONCLUSIVE PRESUMPTION IS SO FANTASTICALLY OVER-BROAD AS TO DEPRIVE THE SALFIS AND THOSE SIMILARLY SITUATED OF EQUAL PROTECTION.

As a device for ferreting out sham marriages,[19] the nine-month conclusive presumption is largely hap-

[19]In addition to the sham marriage rationale, SSA suggests that the nine-month conclusive presumption may be justified as a means of limiting survivorship benefits to those marriages in which the widow and stepchildren have become economically dependent upon the wage earner. This alternative rationale is not additionally treated here since it has already been dealt with, *supra* (see Part I, B). To summarize that treatment, the nine-month conclusive presumption cannot be considered to be a test of dependency: (a) because if it were, the different treatment accorded where the wage earner's death is accidental would be inexplicable; (b) because such an indirect test of dependency in a stepchild would be redundant since direct proof

hazard–only slightly less random than an exclusion of left-handed applicants. The presumption is both substantially underinclusive and astoundingly overinclusive. It will not reach a substantial proportion of the (hypothetical) sham marriage applications, *i.e.*, all those in which the wage earner manages to eke out more than nine months of life after marriage. More important is its overbreadth since, for every hypothetical application based upon a sham marriage which it will exclude, it will also exclude hundreds (perhaps thousands) of applications based upon genuine marriages. To a statute like this the traditional deference to legislative experimentation and the legislature's right to cure only part of an evil is simply inapplicable. For the challenge here is based not so much upon Congress' failure to cover the entire field, as upon its excess in heedlessly excluding hosts of genuine applications in order to pretermit a few fraudulent ones.[20]

As the commentators have recognized, this Court has seen comparatively few such "overinclusion" cases, although these are far "more objectionable" than the familiar "underinclusive" cases in which maximum judicial deference to legislative classification is required.[21] Race, national origin, alienage and other such suspect classifications are almost always vastly overin-

of dependency is required as a condition of their eligibility; (c) because it is the clear policy of the Social Security Act to provide survivorship benefits to a wife without any test of economic dependency; and (d) because a nine-month conclusive presumption is both unnecessary and conspicuously ineffective as a test of dependency.

[20]See Carrington v. Rash, 380 U.S. 89.

[21]"Developments In The Law–Equal Protection", 82 Harv. L. Rev. 1065, 1086-1087 (1969). In the germinal law review article

clusive because they are based upon an attempt to taint an entire class with an evil which in fact characterizes only some of its members. Even where such suspect classifications were not involved, this Court has almost

discussing and categorizing under and overinclusive classifications, Tussman and TenBroek point out the much greater probability of unfairness in an overinclusive than an underinclusive classification: "[In an underinclusive classification] all who are included in the class are at least tainted by the mischief at which the law aims; while overinclusive classifications reach out to the innocent bystander, the hapless victim of circumstances or association." They go on to suggest that overinclusive classifications can be justified only by a state of public emergency in which there is not time for a more careful differentiation. "The Equal Protection of the Laws", 37 Cal. L. Rev. 341, 351-352.

SSA cites North American Company v. Securities and Exchange Commission, 327 U.S. 686, 710-11 (1946) for the proposition that "if evils disclose themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." A reading of this language in context, however, discloses that it was not intended to validate overinclusive (or indeed any) classifications since the case did not involve any equal protection question. The legislation involved did not heedlessly sweep together a large group of innocent persons and a small one of malefactors, penalizing them all for the misconduct of the latter. Indeed the legislative scheme was not punitive but prophylactic and involved a classification exactly congruent with the legislative purpose which was to protect the national economy by imposing a single uniform regulatory scheme upon gas and electric holding companies. As the Court went on to say in the sentence immediately succeeding that quoted by SSA: "[The legislation in question] is not designed to punish past offenders, but to remove what Congress considers to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality." 327 U.S. at 711.

invariably struck down classifications which it explicitly identified as overinclusive (or over and underinclusive). *See e.g. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-536 (1973):

> [It is argued in support of a statute barring members of "unrelated households" from food stamp eligibility that such households] are more likely than "fully related" households to abuse the program [and] that such households are "relatively unstable", thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the government's wholly unsubstantiated assumptions concerning the difference between "related" and "unrelated" households, we still cannot agree with the government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constituted a rational effort to deal with these concerns. [Emphasis in original.]

Accord: Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (rejecting the justification that a requirement that incarcerated criminals, but not those who received a fine or suspended sentence, must repay local government for the cost of transcripts is a means of deterring frivolous appeals: "... the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed."); *Eisenstadt v. Baird*, 405 U.S. 438, 451 (1972) (considered as a health measure, a statute providing that contraceptives can be distributed only by those licensed to distribute them to married persons "would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married") (*see also* White & Blackmum, J.J. concurring specifically on these grounds alone, Id. at 463-465).

Jiminez v. Weinberger, 414 U.S. 1061 (1974) in which just last Term this Court invalidated another provision of the Social Security Act is precisely in point. The language in which the Chief Justice held the statute overbroad needs no gloss to demonstrate its applicability to the present case:

> We recognize that the prevention of spurious claims is a legitimate governmental interest and that, dependency of illegitimates in appellants' subclass as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, *it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency* and their right to insurance benefits, and it would discriminate between the two subclasses of after-born illegitimate without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.
>
> *The Secretary does not contend that it is necessarily or universally true that all illegitimates in appellants' subclass would be unable to establish their dependency and eligibility under the Act if the statute gave them an opportunity to do so.* Nor does he suggest a basis for assumption that all illegitimates who are statutorily deemed entitled to benefits under the Act are in fact dependent upon

> their disabled parent. Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, *the Act's definition of these two subclasses of illegitimates is "over-inclusive"* in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence *to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provision of the Fifth Amendment. Schneider v. Rusk*, 377 U.S. 163, 168; *Bolling v. Sharpe*, 347 U.S. 497, 499. [Emphasis added.]

ARGUMENT [SOVEREIGN IMMUNITY]

SSA having raised the soverign immunity defense, the Salfis must discuss this regrettable and confusing doctrine in its various permutations and at excrutiating length. But before so embarking, it is appropriate to note that what SSA really relies upon is not sovereign immunity but a frivolous claim that administrative remedies have not been exhausted. SSA concedes (and it is otherwise clear) that Congress has waived sovereign

immunity to suits for Social Security benefits by enacting 42 U.S.C. 405(g). The Salfis did not explicitly invoke that statute[22] below because, on its face, it appears to require the exhaustion of an administrative remedy which could not resolve their purely constitutional claims. While the action was pending below, however, another member of the class submitted the Salfis' pleadings in an SSA administrative appeal in order to raise the constitutional question. SSA refused to hear that appeal, holding that it lacked jurisdiction to decide constitutional claims and that these could be resolved only in the judicial forum.[23] That decision, having been affirmed by HEW on March 27, 1974,[23] is entitled to "great deference" by this Court. *Johnson v. Robison*, 415 U.S. 361, 367-368 (1974) (deferring to holding by the Board of Veteran's Appeal that it had

[22]The jurisdictional statutes expressly relied upon in the Complaint were 28 U.S.C. 1331 (federal question), 1343 (civil rights), 1361, 2201 and 2202 (declaratory judgment) and the Administrative Procedure Act. Of course, under the Federal Rules of Civil Procedure and the general principles of modern jurisprudence, the Salfis were not required to name any jurisdictional basis whatever, and were entitled to relief under any statute relevant to the issue set out in the Complaint. Wilwording v. Swenson, 404 U.S. 249 (1971), Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). Nor does the fact that the judgment below does not specifically rest upon §405(g) preclude this Court from affirming it as authorized thereby. See e.g. Brown v. Allen, 344 U.S. 443, 459 (" 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' ")

[23]The administrative law judge's decision "In the Case of Lillian Daniels" issued November 14, 1973, was introduced by the Salfis below and is quoted in pertinent part at p. 21 of the Salfi's Motion to Affirm in this Court.

no jurisdiction to decide constitutional questions.)[24] The essential frivolity of SSA's sovereign immunity claim is evident from its failure to claim immunity in a procedurally identical case now pending in this Court. *Weinberger v. Wiesenfeld*, No. 73-1892. In that case, individual retroactive Social Security benefits were awarded upon the invalidation of a Social Security statute, the plaintiff having proceeded under 28 U.S.C. §1331 and 42 U.S.C. §405(g) without ever having presented his constitutional claims to the administrative tribunal.[25] SSA accepts the rectitude of that procedure on appeal–and in the District Court it stipulated that exhaustion of the administrative remedy would have been futile since the administrative tribunal had no jurisdiction to decide constitutional questions.[26]

[24]In any event, it is evident that SSA's policy is to refuse to hear constitutional questions regardless of whether §405(g) should be interpreted to allow it to decide them. It would seem to follow that SSA would be estopped from raising failure to exhaust administrative remedies as to constitutional claims as a bar to §405(g) jurisdiction.

[25]The failure to raise the sovereign immunity claim in the Wiesenfeld case might seem explicable on the practical grounds that only individual retroactive benefits were awarded in that case. However if SSA were motivated by practical considerations, it would never have raised sovereign immunity in this case since even a favorable decision from this Court on that ground will not save it a penny. Rather, such a decision would simply result in the institution by some member of the Salfi class who has exhausted the administrative remedy of a §405(g) action as to which sovereign immunity will be no defense.

[26]See Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981, 985 (D. N.J. 1973). The District Court held there (as did the court below in the present case) that where purely constitutional claims were presented it enjoyed jurisdiction under 28 U.S.C. §1331 and did not, therefore, determine whether additional alternative jurisdiction existed under 42 U.S.C. §405(g).

I.

BY ENACTING 42 U.S.C. §405(g), CONGRESS HAS CONSENTED TO SUITS FOR SOCIAL SECURITY BENEFITS UNDER THAT SECTION AND/OR OTHER SOURCES OF JURISDICTION WITHOUT EXHAUSTION OF THE ADMINISTRATIVE REMEDY WHEN THIS IS REFUSED BY SSA.

It is clear that an administrative appeal of the Salfis' constitutional claims would have been a waste of time both for them and for the administrative agency. Recognizing this, a three-judge district court has recently held that a §405(g) may be maintained without exhaustion of administrative remedies where the only question at issue is the constitutionality of a federal statute. *Diaz v. Weinberger*, 361 F.Supp. 1, 4-5 (S.D. Fla. 1973). Other courts, including the one below, have adopted the alternative hypothesis that the suit may be maintained without exhausting administrative remedies under 28 U.S.C. 1331 (or other jurisdictional statutes). *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F.Supp. 981, 985 (D. N.J. 1973), *Williams v. Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972), *Gainville v. Richardson*, 319 F.Supp. 16 (D. Mass. 1970), *Rhodes v. Weinberger*, C.A. No. 74-1511 (E.D. Penn.)[27] and cases there cited.[28]

[27]See Memorandum and Order of January 25, 1975 attached as an Appendix to this brief.

[28]There is also one contrary case which is described in the following language of fn. 2 of Rhodes v. Weinberger: "The exception is Bartley v. Finch, 311 F.Supp. 876 (E.D. Ky. 1970) where a three-judge court ruled that it lacked jurisdiction because plaintiffs failed to exhaust their administrative remedies [under §405(g)]. The Court then went on to decide against plaintiffs on the merits. On appeal, the Supreme Court affirmed on the merits, 404 U.S. 980 (1971), thus implicitly deciding that jurisdiction was proper."

Although this Court has yet to construe §405(g) or its relationship with other sources of federal jurisdiction in this respect, just last Term it held that an even more sweeping limitation on judicial review—committing all decisions on Veteran's benefit claims to the *unreviewable* discretion of the Veteran's Administration—was not intended to foreclose constitutional challenges to the statutory scheme which the Veterans' Administration had no jurisdiction to hear. *Johnson v. Robison*, 415 U.S. 361 (1974). It would be inconsistent with that decision, with the generally understood purposes of the exhaustion requirement, and with common sense to interpret §405(g) as requiring that plaintiffs situated as were the Salfis must go through a useless administrative appeal before they can file a lawsuit and obtain a decision. Innumerable opinions of this Court over the past century have recognized that the exhaustion requirement exists for the intensely practical purposes of affording the government agency involved an opportunity to review and correct factual errors or misinterpretations of law and giving the parties and the courts the benefit of the agency's experience and expertise in the subject matter. *See e.g. McKart v. United States*, 395 U.S. 185 (1969), *Parisi v. Davidson*, 405 U.S. 34 (1972) and cases there cited. This salutory principle of law is therefore inapplicable to constitutional claims which administrative agencies have no power to adjudicate. *Johnson v. Robison*, *McKart v.*

United States, Parisi v. Davidson, supra. See also Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1969). It cannot be doubted that Congress was fully cognizant of these principles–and of the common sense reasoning upon which they are based–when it waived sovereign immunity by enacting §405(g). It follows either that §405(g) actions can be brought without regard to exhaustion of an unavailable administrative remedy, or that the section's waiver of sovereign immunity must be deemed to extend to suits to establish the right to Social Security benefits brought under other sources of federal jurisdiction.

This result is suggested at once by one of the earliest and one of the latest sovereign immunity cases decided by this Court. *Kendall v. United States*, 37 U.S. (12 Pet.) 522 (1838) and *Honda v. Clark*, 386 U.S. 487 (1967). In *Kendall* a statute authorizing the Solicitor of the Treasury to settle certain claims was held implicit consent for a suit to require the Postmaster General to honor the settlement–a suit in which "the real parties to the dispute were, therefore, the [claimants] and the United States." 12 Pet. at 611. in *Honda*, the Court expanded a waiver of sovereign immunity as to suits brought against the Alien Property Custodian by holding that a very abbreviated statute of limitations was tolled according to traditional equitable principles which it implicitly embraced. The factors relied upon by the Court were similar to those relied upon here: (a) the injustice of a contrary holding in depriving litigants of their proper claims; (b) the clarity of Congress' general purpose of dispensing with immunity in order to allow litigation of contested claims; (c) the evident purpose of the limitation construed being to enhance

administrative efficiency "and not primarily as a shield for the Government";[29] and (d) the existence of a traditional equitable principle of which Congress was doubtless aware in enacting the specific limitation involved.

Nor is there anything revolutionary about suggesting that a waiver of sovereign immunity under a statute limited in subject matter is applicable to a claim limited to the same relief brought under general jurisdictional statutes like 28 U.S.C. §§1331, 1361 and the Administrative Procedure Act. Where the alternative is unnecessary delay or duplication of litigation this Court has recognized extraordinary remedies without regard to over-technical jurisdictional quibbling. This is the rationale under which this Court created the doctrine of "pendent jurisdiction" whereby federal courts may entertain state claims of which they would not otherwise have jurisdiction if these are factually identical to federal claims of which they do have jurisdiction. *Hurn v. Oursler*, 289 U.S. 238 (1933) and *United Mine Workers v. Gibbs*, 383 U.S. 822 (1966) were creative responses to a situation in which the existence of identical, but jurisdictionally inconsistent, federal and state claims had formerly led to duplicative litigation. Similarly, just last term, this Court found such considerations dispositive in clarifying the authority of federal courts to entertain federal statutory causes of action (of which their jurisdiction is dubious) as pendent to federal constitutional causes of action. *Hagans v. Lavine*, 415 U.S. 528 (1974), and cases there cited.

[29] 386 U.S. at 496.

II.

SOVEREIGN IMMUNITY DOES NOT BAR A JUDGMENT WHICH MERELY REQUIRES FEDERAL OFFICERS AND AGENCIES TO CEASE VIOLATING THE CONSTITUTION AND TO CORRECT THE EFFECT OF PAST VIOLATION.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 690 n.10 (1949) and cases there cited. Conceding this general principle, SSA nevertheless argues that the judgment below violates sovereign immunity because it orders that all those unconstitutionally denied benefits be notified of their opportunity to reapply and, if now found otherwise eligible, be paid the past due benefits.[30] *Larson's* Footnote 11, suggesting that, even in a constitutional case, sovereign immunity "may" bar awards "of unquestionably sovereign property" can be seen as validating SSA's position. But the ambiguity of Footnote 11's language (which has not further been clarified by this Court) lends support to several possible interpretations. The Ninth Circuit (and consequently the court below) follows Professor Jaffe's view that Footnote 11 bars only relief which is so sweeping as to empty the Treasury or otherwise gravely impede the operation of

[30]SSA's objection goes only to the retroactive benefit aspect of the notification requirement. SSA apparently now concedes (Opening Brief "Questions Presented" (p.2) and pp. 21-22). The propriety of requiring it to notify those previously denied benefits so that they may reapply in order to become eligible for *future* benefits.

the federal government.[31] Alternatively, there is some question whether the language of Footnote 11 has any application at all to monetary awards like that here involved. The "unquestionably sovereign property" involved in *Larson*, its progeny and its progenitors was not money from the federal treasury, but realty (or occasionally "personalty"—if an item like a cruiser can be so denominated), the ownership or possession of which was in dispute. Other language in *Larson* (337 U.S. at 703-704) tends both to restrict the breadth of Footnote 11 and to generally support the judgment below:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. . . . But the reasoning is not applicable to suits for specific relief. For it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. *The Government, representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents*

[31]Jaffe, Judicial Control of Administrative Action, 226-227; Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 Harv. L. Rev. 1, 34 (1963). State of Washington v. Udall, 417 F.2d 1310, 1318 (9 Cir. 1969), Turner v. Kings River Conservation District, 360 F.2d 184, 190 (9 Cir. 1966). But see Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971).

a limited number of property or contract rights.

There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions or officers of the Government, it is proper that the courts have the power to grant relief against these actions. But in the absence of a clear constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs *the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.* [Emphasis added.]

Although retroactive benefits are a form of equitable relief, as SSA reminds us this Court has recently held that such an award is "in practical fact, indistinguishable in many aspects from an award of damages against the State." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Whatever may be the proper interpretation of *Larson*, sovereign immunity has never been viewed by this Court as barring awards like the judgment below.[32] Thus, this Court has recently affirmed an award identical to that involved here—an award of class

[32] *Cf.* Miguel v. McCarl, 291 U.S. 442, 455 (1934) (mandating payment of retirement or pension benefits illegally withheld), State of Ohio v. Helvering, 292 U.S. 360 (1934) (entertaining, although deciding adversely, state suit to enjoin collection of taxes by the United States—Kansas v. United States, 204 U.S. 33, holds that federal sovereign immunity applies to suits by states), Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) (enjoining collection of unconstitutional federal taxes). *See also* Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900).

active benefits upon a finding that a provision of the Social Security Act was unconstitutional. *Griffin v. Richardson*, 346 F.Supp. 1226, aff'd 409 U.S. 1969 (1972). *See also Morton v. Ruiz*, 415 U.S. 199 (1974) (upholding class action to mandate reexamination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation), *Department of Agriculture v. Moreno*, 413 U.S. 508 (1973) (declaring unconstitutional statutory restriction on food stamp eligibility and mandating payment of benefits to class) and *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (same).

SSA seeks to buttress its sovereign immunity argument with *Edelman v. Jordan, supra*. But that case concerned *state* sovereign immunity which involves far different considerations than federal sovereign immunity and, because it is enshrined in the 11th Amendment, is a far more difficult jurisdictional obstacle. The central purpose of the 11th Amendment's restriction on the federal judiciary—outraged federalism—is simply irrelevant to a case like the present involving the assertion of federal jurisdiction over *federal* officials and agencies.[33]

[33] On the contrary, as this Court has stated (adopting the language of a lower court): "'We yet like to believe that whereever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.'" McNeese v. Board of Education, 373 U.S. 668, 674, n.6 (1963). That reasoning is even more imperative where, as here, the absence of any alternative state jurisdiction means that denial of federal jurisdiction will preclude any judicial protection whatever for the Salfi family's constitutional rights.

The 11th Amendment represents a state "constitutional right" which this Court cannot abrogate, circumscribe, or limit. *Edelman, supra.*, 415 U.S. at 673. In contra-distinction, federal sovereign immunity is a policy created by the federal judiciary alone which this Court may abandon or restrict as it sees fit in view of such advances in jurisprudential thought as may have occurred since the 11th Amendment was enacted in the 18th Century.[34] Among those advances has been the utter discreditation of the doctrine of sovereign immunity.[35] As Mr. Justice Frankfurter said for this Court in *National City Bank v. Republic of China*, 348 U.S. 356, 359 (1955):

[34]Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060, 1081 (1946) "[Confining sovereign immunity to cases] where no substantial claim is made that the officer is acting pursuant to an unconstitutional enactment, or in excess of his statutory authority . . . can be accomplished by the courts without the necessity of legislative action. In suits against government officers, the courts have always decided for themselves the question of how and to what extent the doctrine should be applied." The author distinguishes the issue of state government liability which has already been determined by the 11th Amendment.

[35]Professor Davis notes that "Nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go." 3 Administrative Law Treatise, 435, while Professor Crampton flatly states that "no scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years." "Non-Statutory Review of Federal Administrative Action", 68 Mich. L. Rev. 387, 419 (1970). An extensive sampling of comments indicating scholarly execration of the doctrine of sovereign immunity appears at pp. 15-18 of the Salfis' Motion to Affirm and/or Dismiss filed in this Court.

> "[T]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."

So far as we can determine, the argument that *Edelman* should be interpreted to bar retroactive benefit judgments against the *federal* government has been presented to only two courts and both have rejected it.[36] It may also be significant that just five weeks before *Edelman* came down, this Court upheld in *Morton v. Ruiz, supra*, a class action for retroactive and prospective federal Indian welfare benefits.

III.

SOVEREIGN IMMUNITY IS INAPPLICABLE INSOFAR AS THE JUDGMENT BELOW ONLY EFFECTUATES SSA's OWN REGULATION REQUIRING THE PAYMENT OF RETROACTIVE BENEFITS.

An SSA regulation provides that persons who are later determined to have erroneously been denied benefits are entitled not only to prospective benefits, but to the benefits denied up to four years in the

[36]The court below implicitly rejected it by refusing to reconsider and rehear the case when the Edelman issue was fully briefed after judgment. The Edelman argument was explicitly rejected in Rhodes v. Weinberger, *supra.*

past.[37] Certainly the decree below cannot be barred by sovereign immunity insofar as it simply requires SSA to accord the Salfi class the same treatment which would be accorded to any other Social Security applicant who had erroneously been denied benefits.

IV.

SOVEREIGN IMMUNITY IS NOT A DEFENSE TO LITIGATION UNDER THE OTHER SOURCES OF JURISDICTION RELIED UPON BY THE SALFIS.

Although the District Court did not rule on them, plaintiffs set out four jurisdictional bases besides 28 U.S.C. §1331. These were: (a) the Administrative Procedure Act; (b) 28 U.S.C. §1361 (mandatory relief against federal officers); (c) 42 U.S.C. §1985(2) (civil rights conspiracy statute) and its jurisdictional counterpart, 28 U.S.C. §1343(1); (d) a cause of action springing from the Fifth Amendment itself without

[37]20 C.F.R. §404.957 reads, in pertinent part:

"An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final under §404.908, §404.916, §404.951 may be reopened:

(a) Within 12 months from the date of the notice of the initial determination (see §404.907), to the party to such determination, or

(b) After such 12-month period, but within 4 years after the date of the notice of the initial determination, upon a finding of good cause for reopening such determination or decision. . . ."

necessity of Congressional authorization as per *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, (1971) and cases there cited.

While there are as yet no decisions on the point, appellees would contend that sovereign immunity is not a bar to the bringing of a case like the present under §1985 or under the *Bivens* constitutional cause of action.[38]

The Administrative Procedure Act authorizes such broad review of administrative action that it has frequently been held to constitute a waiver of sovereign immunity. *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 668-669 (2 Cir. 1973) (sovereign immunity does not bar suit to require HEW to correct admittedly inadequate reimbursement for Medi-Cal services performed by contracting agency), *Constructores Civiles de Centro-America v. Hannah*, 459 F.2d 1183, 1191 (D.C. Cir. 1972) (sovereign immunity does not bar suit for "mandatory injunction and

[38]Since Bivens involved federal officers and a constitutional provision directed to the federal government, it is clear that Bivens-type litigation may be brought against federal officers. Since § 1985, unlike its companion, 42 U.S.C. 1983, does not contain the limiting words, "color of *state* law," it is equally applicable to federal officers. City of Kenosha v. Bruce, 412 U.S. 507 (1973), holds (by implication) that §1985 as well as §1983 actions may not be maintained against *state agencies*. But the basis of this holding is the debate on the "Sherman Admendment" which showed Congressional dubiety as to whether federal courts could entertain suits against state agencies. Obviously, Congress could have entertained no doubt that it could authorize federal courts to entertain causes of action against federal officers or agencies.

declaratory judgment" to require A.I.D. to consent to the letting of a contract to the plaintiff company), *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-874 (D.C. Cir. 1970) (sovereign immunity does not bar action for declaratory relief of plaintiff's right to contract award where, allegedly, another bidder was improperly accepted), *Klatscha v. Driver*, 411 F.2d 436, 445 (2 Cir. 1969) (sovereign immunity does not bar suit by government employee for injunctive and declaratory relief from allegedly illegal disciplinary transfer), *Mulry v. Driver*, 366 F.2d 544, 547 (9 Cir. 1966) (sovereign immunity does not bar suit by government employees to invalidate regulation which prevents them from engaging in after-hours employment), *Estrada v. Ahrens*, 296 F.2d 690, 698 (5 Cir. 1961) (sovereign immunity does not bar action by alien to require his admission into the United States). *Per contra: Littell v. Morton*, 445 F.2d 1207, 1212-1214 (4 Cir. 1971) and cases there cited.

Congress enacted 28 U.S.C. §1361 for the precise purpose of providing a mandamus-type cause of action against federal officers. In doing so, it implicitly consented to litigation like the present. This is particularly true since Congress must have been aware of the numerous decisions by this Court holding sovereign immunity no bar to mandamus-actions to force federal officers to pay pension, retirement and/or other benefits comparable to Social Security. *See e.g., Miguel v. McCarl*, 291 U.S. 442, 455. *See also Roberts v. United States ex rel Valentine*, 176 U.S. 221 (1900). Just last Term this Court held in a case brought under §1361 that a class (which it redefined) could maintain an action to mandate re-examination of applications for

federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation. *Morton v. Ruiz*, 415 U.S. 199 (1974). (The judgment must rest either upon the view that sovereign immunity was waived by §1361, or that it was never involved because the officers sued were acting in excess of their authority—see Part II of this section, *supra*.)

V.

A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR ITS IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL.

It has been held that *Larson* Footnote 11 is inapplicable where the fund which is subject to the suit has already been appropriated by Congress for the purpose of being so disbursed. *Commonwealth of Pennsylvania v. Lynn*, 362 F.Supp. 1363, 1368-1369 (D. D.C. 1973), *Local 2677, AFGE v. Phillips*, 358 F.Supp. 60, 68-69 (D. D.C. 1973). *See e.g., State Highway Commission v. Volpe*, 479 F.2d 1099, 1123 (8 Cir. 1973) ("notwithstanding, we do not consider the court's decree in the instant case as being affirmative in nature [within the prohibition of the *Larson* footnote]. It requires only that the defendant officers cease unauthorized action. *Cf. Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9 Cir. 1971). The resultant release of

funds is only to the extent that Congress has already authorized them to be appropriated and expended.")

Similarly, the judgment below cannot be said to operate against the Treasury because Social Security benefits are paid from a Trust Fund derived from contributions of employers and wage earners rather than a regular appropriation of Treasury funds. And the decree does not mandate the payment of benefits but only re-examination of eligibility without application of the invalidated conclusive presumption.

ARGUMENT [APPROPRIATENESS OF RETROSPECTIVE APPLICATION]

SSA relies upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 which holds that extraordinary circumstances may justify departure from the normal expectation that judicial decisions will apply retrospectively as well as prospectively. *Chevron* holds that retrospective application can be denied where: (a) a party has detrimentally relied upon a legal rule which a court (unforseeably) overrules or eliminates; (b) retrospective operation will not further the salutory operation of the new rule; and (c) retrospective application would "produce substantial inequitable results." 404 U.S. at 106-107. SSA attempts to satisfy the first of these criteria by characterizing the application of the conclusive presumption doctrine to a Social Security case as "a radical departure" from previous law.[39]

It should be sufficient to reiterate that the conclusive presumption doctrine has been a recognized part of

[39]Opening Brief, p. 20.

Due Process for almost 65 years. Indeed this Court had held a federal statutory conclusive presumption repugnant to the Fifth Amendment several years before the original passage of the Social Security Act, which itself predated by several years the enactment of the predecessor to the present nine-month conclusive presumption. *See Heiner v. Donnan, supra*, (1932). Surely neither Congress nor SSA during the almost 40 years of the Social Security Act's existence, have labored under the misconception that the Act was free from the guarantees of the Fifth Amendment. And if they had so misconceived the law, they would have been enlightened by *Flemming v. Nestor, supra* in which this Court scrutinized the Act under the Fifth Amendment, and *Department of Agriculture v. Murry, supra.* in which this Court invalidated one of its provisions as an unconstitutional conclusive presumption. Moreover, SSA has yet to suggest any way in which it changed position or detrimentally relied upon any belief that the conclusive presumption doctrine does not apply to the Social Security Act.

Secondly, SSA asserts that the giving of retroactive benefits is somehow inconsistent with the Social Security benefit scheme, citing only a *welfare* case, *Rothstein v. Wyman*, 467 F.2d 226 (2 Cir. 1972). The Salfis would inquire why, if retroactive benefit payments are inconsistent with the Act, SSA's own regulations specifically provide for them when an erroneous benefit denial is discovered?[40] *Rothstein's* holding provides no answer to this question, for it rests upon the unique features of the welfare benefit

[40]Cf. 20 C.F.R. 404.957 quoted at n.37, *supra*.

system—a system based upon a need standard under which eligibility is continuously retested. Retroactivity would be inappropriate, *Rothstein* reasons, since many members of the class might presently no longer be eligible for welfare and, since in any event, the needs which the benefits were originally intended to meet are past.[41] Unlike welfare, Social Security survivorship benefits are not based upon need, but upon statutorily specified eligibility criteria which, once established, continue without reference to change of economic circumstances as measured by a need, or any other test.[42] Since eligibility for survivorship benefits never

[41]Rothstein's holding in this respect does not meet with universal acceptance. Compare Jordan v. Weaver, 472 F.2d 985 (7 Cir. 1973) rev'd on other grounds, Edelman v. Jordan, *supra*. See also: Thompson v. Shapiro, 270 F.Supp. 331, 338, aff'd 394 U.S. 618; Gaddis v. Wyman, 304 F.Supp. 717, aff'd. 397 U.S. 49; Grubb v. Sterrett, 315 F.Supp. 990 aff'd. 400 U.S. 922; Rodriquez v. Swank, 318 F.Supp. 289 aff'd. 403 U.S. 901; Doe v. Swank, 332 F.Supp. 61 aff'd. 404 U.S. 987; Zarate v. State Department of Health & Rehabilitation Services, 347 F.Supp. 1004 aff'd. 407 U.S. 918; Gilliard v. Craig, 331 F.Supp. 587, aff'd. 409 U.S. 807.

[42]An applicant is eligible for welfare if he or she meets certain defined criteria (*e.g.* having a dependent child, being blind or disabled) *and* qualifies under the "means test", *i.e.*, not having earnings or property which exceed certain specified minimal amounts. Eligibility ends as soon as the recipient acquires sufficient property by inheritance or gifts or a sufficient salary.

In contra-distinction, a person becomes and remains eligible for survivorship benefits without regard to what property he or she has or may subsequently acquire. Benefits continue, without regard to any means test, until some specified statutory cut-off point (*e.g.*, in the case of children or stepchildren, age 18). Survivorship benefits can, it is true, be reduced to the extent of earnings from employment (42 U.S.C. 403(b), but this is simply

turned upon need, the question of whether various members of the class may have become more or less needy subsequent to the time when the retroactive benefits were due them simply never arises. Application of the welfare analogy in the Social Security area makes no more sense than suggesting that personal injury awards should not compensate for pain and suffering since by the time the case is filed the tort victim's pain and suffering is all over and done with anyway.

Finally, the award of class retroactive damages would not be inequitable to present Social Security recipients. Far from decreasing the funds available to them, it would simply enlarge the number of recipients, thereby requiring an enlargement of the congressional appropriation for the Trust Fund. This is something which occurs regularly whenever, as often happens, the number of recipients exceeds that which SSA estimated in formulating the preceding Congressional appropriation to the Trust Fund. (Indeed, if this "inequity" objection were serious, it would equally foreclose prospective benefits for the class since they were not considered by SSA and Congress in formulating the latest estimate of the number of beneficiaries for whom the present appropriation must provide.)

This case does represent a serious "inequity" of course. That inequity is that fact that a large class of persons entitled to Social Security benefits have for a number of years been unconstitutionally excluded therefrom. Unfortunately, it is this very inequity which SSA seeks to continue.

designed to reduce the competition of old age and survivorship beneficiaries in the employment market. Benefits are not reduced regardless of how much the applicant may receive from non-salaried earnings—bonds, stocks, corporate profits, etc.

ARGUMENT [CLASS ACTION ISSUES]

Apparently all that SSA seeks by way of appellate relief is some general advice to the court below on its class action procedures. Earlier SSA had questioned that court's certification procedure and vigorously objected to a post-judgment notification requirement which SSA misconstrued as requiring it to provide the kind of *prejudgment* notice to class members which *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974) requires plaintiffs to provide.[43] Although continuing to allege (harmless) error in the certification procedure, SSA

[43]Far from ordering SSA to provide Eisen-type prejudgment notice, the court below never required notice to the class at all since this was an action under Rule 23(b)(2) in which prejudgment notice is not required, rather than one under Rule 23(b)(3) which would be governed by Eisen. The judgment required that defendants inform the approximately 20,000 applicants who have been excluded by the nine-month conclusive presumption over the past six years (see note 7, *supra*) that they are free to seek a reevaluation of their eligibility for retroactive and/or future benefits. Of course, without such notification, those people would presumably never know that their original rejection was wrongful and would therefore never reapply for a redetermination of their eligibility. Such notification is regularly required of defendants in equitable decrees where necessary to correct the effects of their previous wrongful or erroneous acts toward the class. *See e.g.*, Reed v. Arlington Hotel Company, Inc., 476 F.2d 721, 725 (8 Cir. 1973) (notification required of correction of previously discriminatory hiring policies), United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) (notification of desistance from previous segregated school policy required to every Black family), Stell v. Savannah-Chattham Board of Education, 333 F.2d 55, 65 (5 Cir. 1964) (same).

apparently now admits that the class judgment below "will be binding on both the Secretary and all claimants"[44] and accepts its duty to notify all claimants who have already been denied under the nine-month conclusive presumption that they may seek prospective benefits by reapplying. (SSA reiterates its objection to class *retroactive* benefits, but this appears to rest upon the sovereign immunity issues heretofore explored rather than upon any question of class action law.)

Since SSA's former class action objections are fully treated in the Salfi's Motion to Affirm and/or Dismiss heretofore filed with this Court, and since SSA seems to no longer press these objections,[45] it will be unnecessary to discuss them at any length. Suffice it to say that any objections which SSA might have had to the class action procedure below were waived when it: (a) stipulated that the trial and all pre-trial proceedings and motions be combined in one hearing; (b) stipulated, without demur, to the class action allegations of the

[44]Appellants' Opening Brief, p.22.

[45]In comparing the "Questions Presented" in SSA's jurisdictional statement with the "Questions Presented" in its Opening Brief, it will be found that the class action question raised has been limited to the propriety of an award of retroactive damages.

Complaint;[46] (c) not only failed to seek a separate or prior certification hearing, but also failed in either written or oral argument to raise any issue of class action procedure; and (d) failed to raise any class action issue thereafter until final judgment had been rendered against it on a class basis, rather than in its favor as it had apparently assumed.

For the foregoing reasons, appellees urge that the judgment below be affirmed.

DATED:

Respectfully submitted,

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By/s/ Don B. Kates, Jr.

Attorneys for Appellees

---

[46]SSA denies that it ever stipulated to the allegations of the Complaint, quoting the first half of the stipulation, Opening Brief, p.22. The full stipulation (with the omitted portion in italics) reads:

> 2. There are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision of 42 U.S.C. §416, *and that this three-judge panel may finally determine the constitutionality of said challenged provisions on the basis of the facts set out in the complaint and affidavits heretofore filed;*
>
> (App. 29, ¶2).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER M. RHODES suing by her next of friend ELLANORIA RHODES,	:	CIVIL ACTION
and	:	
CLARA and BERNICE BROGDON, suing by their next of friend PEARL BROGDON	:	
v.	:	SENT BY JOHN J. HARDING CLERK, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA AT PHILADELPHIA 19107
CASPAR WEINBERGER, Secretary of Health, Education and Welfare	:	
	:	NO. 74-1511

MEMORANDUM AND ORDER

Newcomer, J. January 21, 1975.

This is one of those fortunately rare cases in which defendant's concession of liability creates more problems than it solves. Plaintiffs Jennifer Rhodes and Clara and Bernice Brogdon are illegitimate minors whom defendant denied child's insurance benefits solely because their natural father had not acknowledged them

or no finding of paternity had been made one year prior to their father's eligibility for retirement insurance. A restriction identical to the one which barred these plaintiffs' eligibility was recently found unconstitutional by the Supreme Court, *Jimenez v. Weinberger*, 417 U.S. 628 (June 19, 1974), and defendant has conceded that the section involved in this case, 42 U.S.C. §416(h)(3)(A), is likewise invalid. An affidavit sworn to by the Deputy Director of the Social Security Administration's Bureau of Retirement and Survivors Insurance states that the *Jiminez* decision permits, "prospectively", an otherwise qualified illegitimate minor to obtain child's insurance benefits without fulfilling the requirements of §416(h)(3)(A). The affidavit explains that "appropriate instructions necessary to effectuate" the change in policy due to *Jiminez* "are being prepared". Defendant contends that his admission of unconstitutionality moots plaintiffs' request for injunctive relief, prevents plaintiffs' claims from being typical of those of the class they seek to represent, and deprives this Court of jurisdiction in that defendant's sovereign immunity precludes a suit for retroactive benefits, the only type of relief which, defendant maintains, plaintiffs can still seek. Defendant also asserts that even assuming sovereign immunity does not bar plaintiffs' retroactive benefits claim, plaintiff cannot base jurisdiction over this claim on any federal statute. Plaintiffs have vigorously opposed defendant's motion to dismiss and have filed for certification of class and for summary judgment on the issue of liability.

Contrary to defendant's arguments, we are of the opinion that plaintiffs' prayer for an injunction is not

moot, that this Court can hear a claim for retroactive benefits as a part of plaintiffs' injunction claim, and that plaintiffs are proper representatives, under Federal Rule 23(b)(2), of a class of those who have or will be denied child's insurance benefits pursuant to 42 U.S.C. §416(h)(3)(A). We will therefore certify plaintiffs as representatives of such a class and grant plaintiffs' motion for summary judgment on the issue of liability, reserving for a future proceeding the tasks of determining the form and scope of an injunction and the amount of retroactive benefits to which the named plaintiff may be entitled.

a. *The Challenged Statute.*

An examination of the statutory scheme for determining eligibility for child's insurance is required before the facts of this case can be understood. The Social Security Act provides that every dependent "child" of a wage earner entitled to old-age insurance may file for child's insurance benefits. 42 U.S.C. §402(d). The statute's definition of "child" includes any natural or adopted child and any individual who could qualify as a child under the intestacy laws of the wage earner's state of domicile, 42 U.S.C. §416(h)(2)(A), or who is the offspring of a marriage which would be valid but for non-obvious defects in the marriage ceremony. 42 U.S.C. §416(h)(2)(B). If a minor, such as each of the plaintiffs herein, does not qualify as a child under this definition he or she may still obtain benefits if the wage earner upon whose account they are claiming has acknowledged his

paternity or if a court has declared such paternity or required support payments because of such paternity *at least one year prior to* the time the wage earner first became entitled to retirement insurance benefits (Or reaches age 65, whichever is earlier).

The Supreme Court in *Jimenez*, cited *supra*, found unconstitutional 42 U.S.C. §416(h)(2)(B), which required that illegitimate children whose relation to the wage earner had not been acknowledged or officially declared before the wage earner became eligible for disability benefits could not obtain child's insurance benefits. The Court stated that this section, when read in conjunction with 402(d)(3)(A) and 416(h)(2)(A) and (h)(2)(B), discussed *supra*, created two classes of illegitimate children born after the wage earner's eligibility for disability payments. The first class consisted of after-born illegitimates who could qualify for benefits because they could inherit property under state intestacy laws or because their parents' marriage was technically invalid. The second class consists of all remaining after-born illegitimate children, who were conclusively barred from benefits by 42 U.S.C. §416(h)(3)(B). The Court found that this classification of after-born illegitimates was not rationally related to any legitimate interest of the Social Security Administration and thus deprived the second class of equal protection of the laws guaranteed them by the Fifth Amendment.

b. *Facts.*

The following facts are undisputed. The named plaintiff Jennifer Rhodes was found to be the natural

daughter of Willie Singleton by a Court of Common Pleas of the County of Philadelphia on October 20, 1969. Jennifer Rhodes, by her mother, Ellanoria Rhodes, first filed for child's insurance benefits under 42 U.S.C. §402(d) on November 29, 1974, as a dependent child of the insured wage earner Willie Singleton, who himself had become entitled to Social Security retirement benefits in September, 1967. That application, and a later re-application, were denied by the Social Security Administration because the finding of paternity had not been made at least one year prior to the wage earner parent's attainment of age 65 or entitlement to benefits as was required by 42 U.S.C. §416(h)(3)(A). Willie Singleton died in January, 1974, and his child, Jennifer Rhodes, applied for and is presently receiving survivor's benefits under 42 U.S.C. §416(h)(3)(C).

Named plaintiffs Clara and Bernice Brogdon are the youngest of five acknowledged, illegitimate children of Pearl Brogdon and the insured wage earner Clarence Glasgow, who himself became entitled to retirement benefits in October, 1962. In August, 1965, Clarence Glasgow filed applications on behalf of Clara and Bernice Brogdon, as well as the three older children, for child's insurance benefits under 42 U.S.C. §402(d). Those applications were initially denied, but after a hearing held in September, 1967, the three older children were found to be entitled to benefits under 42 U.S.C. §416(h)(3)(A). Clara and Bernice Brogdon were denied those benefits for the failing to meet the time requirements of 42 U.S.C. §416(h)(3)(A), in that they were born after the wage earner parent, Clarence

Glasgow, had become entitled to Social Security benefits. Clarence Glasgow died on December 24, 1968.

The complaint in this matter was filed in this Court on June 17, 1974, two days before the Supreme Court announced its opinion in *Jiminez*.

I.

Subject Matter Jurisdiction

Defendant contends that the affidavit stating that 42 U.S.C. §416(h)(3)(A) is invalid and that "appropriate regulations are being prepared" to implement a change in the Bureau's policy moots plaintiffs' request for declaratory and injunctive relief, leaving retroactive benefits as the only remedy remaining to plaintiffs. Defendant further asserts that plaintiffs cannot pursue this remedy against the federal government both because the government as a sovereign has not consented to such a suit and because plaintiffs have alleged no jurisdiction statute which will support such a suit.

i. mootness.

It would seem that defendant's admission is insufficient to meet the criterion of mootness established by *United States v. W.T. Grant*, 345 U.S. 629 (1953). *Grant* set forth three criterion for a finding of mootness: the good faith of the announced intent to discontinue the challenged activity; the effectiveness of the discontinuance; and, in certain cases, the character

of the past violations. Plaintiffs have raised substantial questions as to the effectiveness of defendant's discontinuance. For example, defendant has not specified the means by which its policy will change nor has it indicated how those who have been denied benefits in the past and who are still eligible would be notified of this change, if, indeed, defendant plans to notify them at all. The fact that these issues, among others, remain unresolved indicates that there is room for an injunction in this case and that plaintiffs' claim for injunctive relief has not been mooted.

ii. sovereign immunity.

Defendant's position is that the retroactive benefits sought by plaintiffs are, in essence, money damages, and thus cannot be awarded against the United States without its consent. In support of this proposition defendant relies heavily on *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1948). In *Larson*, the Court upheld the dismissal of a suit to enjoin the Administrator of the War Assets Administration from selling elsewhere surplus coal contracted for by the plaintiff therein. The Court ruled that the doctrine of sovereign immunity bars a suit for specific performance against a federal officer acting in his official capacity. However, the Court went on to outline three situations where sovereign immunity would not bar such a suit: where the federal officer is acting in his own capacity as an individual; where he is acting beyond the scope of his official duties; and where, as here, his actions are taken under a statute or

order claimed to be unconstitutional. As an exception to these exceptions, the Court stated:

> "Of course, a suit may fail, as one against the sovereign . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22, 33 L.Ed. 849, 10 S.Ct. 509 (1890)." 337 U.S. at 691 (fn.).

First, this "unquestionably sovereign property" caveat seems to have vanished in subsequent Supreme Court discussions of sovereign immunity. *State of Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962). In *Malone*, cited *supra*, the Court stated:

> "[*Larson*] expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer's action is 'not within the officer's statutory powers or, if within those powers, only if those powers, or their exercise in the particular case, are constitutionally void' ". 369 U.S. at 647.

Second, it is unclear whether *Larson* and its progeny even apply to a case such as the present one. Each of the Supreme Court cases cited above, as well as the *North Carolina v. Temple case*, cited in *Larson*, involved specific performance suits over property owned or seized by the sovereign in which the plaintiff claimed an interest. The Court in *Larson* distinguished these suits from suits for monetary damages by stating:

> "It is argued that the principle of sovereign immunity is an archaic hangover not consonant

> with modern morality and it therefore should be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages . . . but the reasoning is not applicable to suits for specific relief. . .
>
> For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the government from acting, or to compel it to act." 337 U.S. at 703-04.

Although retroactive benefits are a form of equitable relief, see discussion at pages 11-12. They are more akin to damages than to the type of specific relief which the Court was discussing.

Leaving aside the question of whether the Courts "unquestionably sovereign property language" applies to an award of money damages as well as a grant of specific performance, it has not been viewed as a bar by those courts awarding retroactive benefits in Social Security cases similar to this one. *Salfi v. Weinberger*, 373 F. Supp. 961 (N.D. Cal. 1974), *cert. granted*, __U.S.__; *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1969 (1972); *Morris v. Richardson*, 346 F.Supp. 494 (N.D. Ga. 1972), *vac. and rem. on other grounds*, 409 U.S. 464 (1973). In fact, the Three-Judge Court in *Jimenez*, upon the remand of that case from the Supreme Court, ordered the Secretary of H.E.W. to provide retroactive benefits to those who had been denied benefits since the suit's inception.

Defendant cites the recent case of *Edelman v. Jordan*, 39 L.Ed. 2d 662 (1974), in support of its

sovereign immunity claim. However, *Edelman* involved an award of benefits unconstitutionally denied in the past from a state Treasury. The Court said that the Eleventh Amendment prohibited such an award even if it was a form of equitable restitution. We do not believe that *Edelman*, which was decided on Eleventh Amendment grounds rather than on the more general sovereign immunity doctrine, should be construed to bar any suit which would compel payments from the federal treasury.

iii. statutory basis of jurisdiction.

Plaintiffs acknowledge that the terms of the Social Security Act itself preclude them from suing upon that Act, 42 U.S.C. §§405(g), 405(h). Section 405(g) states:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

Section 405(h) states:

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearings. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section

> 41 of Title 28 [the section of the Judicial Code defining the jurisdiction of the Federal district courts which has been superseded by section 1331 *et seq.* of new Title 28 U.S.C.]. to recover on any claim arising under this subchapter."

Sections 404.901 *et seq.* of Social Security Administration Regulations No. 4, 20 C.F.R. 404.901 *et seq.*, set forth a four-step administrative process by which a claimant for benefits under the Act may obtain a "final decision" of the Secretary. Following an initial determination on his claim (Section 404.095 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.905) a dissatisfied claimant may obtain reconsideration (Section 404.914, 20 C.F.R.404.914). Subsequent to a reconsidered determination, an individual may request a hearing *de novo* before an independent administrative law judge (Section 404.197, 20 C.F.R. 404.917) and review by the Appeals Council of the Social Security Administration (Section 404.945, 20 C.F.R. 404.945).

None of the plaintiffs in the instant case obtained a final decision of the Secretary. Plaintiff Rhodes pursued her claim through a reconsideration determination dated March 22, 1974, and then commenced this action. The claim filed on behalf of Clara and Bernice Brogdon was not pursued subsequent to the decision of the hearing examiner on November 27, 1967. Thus, there has been no "final decision" pursuant to section 205(g).

However, defendant goes on to claim that §405(h) prevents judicial review of Social Security Administration actions under any other statutes unless[1] a claimant has fulfilled the requirements of §405(g). With one exception[2], the courts have declined to accept this position where the parties have had an opportunity to develop a complete factual record in the administrative agency proceedings, where the only question remaining is a constitutional one on which the agency has no special expertise, and where recourse to the agency's review procedures would be futile. *Salfi v. Weinberger*, 373 F. Supp. 961 (N.D. Cal. 1974), *cert. granted* __U.S.__(1974); *Williams v. Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972); L. Jaffe, Judicial Control of Administrative Action 424-458 (1965).

This Court unquestionably has jurisdiction over plaintiffs' prayer for declaratory and injunctive relief under 28 U.S.C. §1361. Mandamus clearly lies to compel the Secretary to cease enforcing an unconstitutional statute. *Richardson v.* U.S., 465 F.2d 844, 850

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[1]Defendant also contends that §405(h) bars review under any other jurisdictional statute regardless of whether §405(g) has been satisfied. This position is universally rejected. Griffin v. Richardson, 346 F.Supp. 1226 (Md. 1972), *aff'd* 409 U.S. 1069 (1972); Morris v. Richardson, 346 F.Supp 494 (N.D. Ga. 1972), *vac. and rem. on other grounds*, 409 U.S. 464; Severance v. Weinberger, 362 F.Supp. 1348 (D.C. D.C. 1973).

[2]The exception is Bartley v. Finch, 311 F.Supp 876 (E.D. Ky. 1970), where a Three-Judge Court ruled that it lacked jurisdiction because plaintiffs failed to exhaust their administrative remedies. The Court then went on to decide against plaintiffs on the merits. On appeal, the Supreme Court affirmed on the merits, 404 U.S. 980 (1971), thus implicitly deciding that jurisdiction was proper.

(3rd Cir. 1972), *rev'd on other grounds*,__U.S.__41 L.Ed. 2d 678 (1974). However the jurisdictional basis of plaintiffs' retroactive benefits claim is more problematical. Several Courts faced with attacks on the Social Security Act's eligibility sections have awarded benefits retroactively as part of a decree enjoining the application of the section found to be unconstitutional. See cases cited at p. 8. These courts thus seem to find the power to award such benefits from the same source from which they find the power to issue an injunction, i.e., their general equity powers.

Once jurisdiction exists for the issuance of an injunction under §1361, and liability has been found, a court may, under certain circumstances, give the injunction retroactive effect. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). This power, entailing as it does the payment of past benefits, does not appear to have been diminished by the Supreme Court in *Edelman v. Jordan*, __U.S.__, 39 L.Ed. 2d 662 (1974), discussed supra, pp. 8-9. While the majority decision in that case declared that a court could not avoid the Eleventh Amendment's stricture against awarding "equitable restitution", it did not address the question of whether the award of past benefits as equitable restitution was proper in the absence of Eleventh Amendment considerations. Therefore, this Court will follow those courts which have found the power to award retroactive benefits as inherent in their power to issue an injunction.

II.

Class Action Status.

Plaintiffs have moved for certification as representatives of a class consisting of all those who have been, are being, or will be denied child's insurance benefits solely because of 42 U.S.C. §416(h)(3)(A). Defendant argues that since all named plaintiffs are presently receiving survivor's benefits and are thus not entitled to prospective child's insurance benefits, their claims are not typical of those of the class. We find this argument unconvincing. Plaintiffs are being directly affected by the enforcement of the section in question and can only recover the benefits allegedly due them if the operation of the challenged section is enjoined. The named plaintiffs thus have the same goal as those class members who will be entitled to benefits in the future--the cessation of the section's enforcement.

However, while plaintiffs appear to be adequate class representatives for purposes of Rule 23(b)(2), their claim for retroactive benefits on behalf of the entire class exceeds the relief available to the class in a (b)(2) class action. *Paddison v. Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973). *Paddison* established the principle, in this Court at least, that the Rule 23(b)(2) category is most efficiently and faithfully used to determine the legality of a practice of general applicability and should not be burdened with such typically (b)(3) problems as determination of individual damage claims, whether or not such claims are styled as equitable. *Paddison* limits a Rule (b)(2) class representative to injunctive relief, as well as any monetary damages which he himself may

have suffered, and leaves the plaintiff free to apply for (b)(3) certification if and when defendant's liability is determined in plaintiff's favor. The fact that we have found, as discussed above, see pp. 11-12, that our jurisdiction to award past benefits depends on equitable principles does not change this Court's policy of postponing the litigation of class members' monetary claims until the determination of defendant's liability. As stated in *Paddison*:

> "Whether past money damages can be properly styled 'equitable relief' for some purposes, this Court is convinced that for the purposes of Rule 23 the problems created by past monetary damages are (b)(3) problems which should be resolved by the criteria of (b)(3) in a separate and explicit determination in each case." 60 F.R.D. at 698.

Those courts awarding retroactive benefits have not clearly articulated the circumstances which warrant such an award, nor have they decided in a uniform fashion how retroactive retroactivity should be. *Salfi v. Weinberger*, cited *supra*, p. 8 (benefits payable from date of original entitlement); *Griffin v. Richardson*, cited *supra*, p. 8 (payable from date of original entitlement); *Jiminez v. Weinberger*, cited *supra*, p. 8 (benefits payable from date of filing of suit only).

There is no valid reason why these questions, as well as the question of how much benefits each individual class member is entitled to, should be resolved in a (b)(2) context, particularly when it is remembered that under (b)(2) the class members will receive no notice that their individual claims are being adjudicated. For these reasons, we will certify plaintiffs as class representatives under Rule 23(b)(2), and withhold

considering the question of whether the class members should be awarded retroactive benefits or the amount of any such award until such time as plaintiffs are certified under 23(b)(3).

III.

Summary Judgment.

Plaintiffs have moved for summary judgment on the constitutionality of 42 U.S.C. §416(h)(3)(A). It is clear from a reading of the pleadings and affidavits, including the affidavit of the Deputy Director of the Retirement and Survivors Insurance Bureaus, that there are no contested facts and that section 416(h)(3)(A) is constitutionally invalid.

IV.

Three-Judge Court.

If, as is the case here, the challenged federal statute is clearly and unquestionably unconstitutional, a three-judge court need not be convened. *Bailey v. Patterson*, 369 U.S. 31 (1962).

This would be true even if defendant had not conceded unconstitutionality, but his admission removes all doubt on this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER M. RHODES suing by her next of friend ELLANORIA RHODES,	:	CIVIL ACTION
and	:	
CLARA and BERNICE BROGDON, suing by their next of friend PEARL BROGDON	:	
v.	:	
CASPAR WEINBERGER, Secretary of Health, Education and Welfare	:	NO. 74-1511

ORDER

AND NOW, to wit, this 21st day of January, 1975, the motion of defendant to dismiss the above captioned action is hereby DENIED.

Plaintiff's motion for certification of class under Rule 23(b)(2) is hereby GRANTED, and plaintiffs are hereby certified as representatives of all those within the Eastern District of Pennsylvania who have been, are being, or will be denied child's insurance benefits solely because of 42 U.S.C. §416(h)(3)(A).

Plaintiff's motion for summary judgment on the issue of liability is hereby GRANTED both as to the named

plaintiffs and as to the class members.

There shall be further proceedings to determine the form and scope of an injunction, to determine whether defendant should be ordered to pay the named plaintiffs those benefits to which they would have been entitled but for §416(h)(3)(A), and to determine the amount of such benefits, if any.

AND IT IS SO ORDERED.

/s/Clarence C. Newcomer, J.
Clarence C. Newcomer, J.

Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-214

OCTOBER TERM, 1974

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare; United States Department of Health, Education, and Welfare; FERNANDO E. C. DEBACA, Director of Region Nine of United States Department of Health, Education, and Welfare; JOHN F. RICHARDSON, Commissioner of Region Nine of the Social Security Administration; Social Security Administration,

Appellants,

—v.—

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, *AMICUS CURIAE*

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INDEX

PAGE

Interest of the Amicus 1

Questions Presented 2

Statement of the Case 3

Summary of Argument 3

POINT I

Sovereign immunity cannot be a defense against an award of retroactive monetary relief from the specially constituted Social Security Trust Fund 4

i—General Conditions 4

ii—Purposes and Functions of Social Security .. 9

iii—Individual Equities and Governmental Prerogatives 13

POINT II

The case law demonstrated that the defense of sovereign immunity does not apply here 18

i—Leading Cases 18

ii—The Relief Requested Cannot Be Characterized as Damages Against the Sovereign .. 24

iii—Equitable Authority 25

PAGE

iv—The Possible Fiscal Consequences to the Social Security Administration Is Not Sufficiently Burdensome to Raise a Sovereign Immunity Defense to an Award of Such Relief 29

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 107 (1971) 2
Anderson v. United States, 205 F.2d 326 (9th Cir. 1953) 15
Anniston v. Davis, 301 U.S. 337 (1951) 22

Berman v. Parker, 348 U.S. 26 (1954) 22
Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. Cir. 1973) 7, 8, 24

Carter v. Butz, 479 F.2d 1084 (3d Cir. 1973) 7, 24
Chernock v. Gardner, 360 F.2d 257 (3rd Cir. 1966) 9
Clackamas County, Oregon v. McKay, 219 F.2d 479 (D.C. Cir. 1954) 21, 24

Dalno v. Calebrezze, 347 F.2d 159 (9th Cir. 1968) 9
Dugan v. Rank, 372 U.S. 609 (1963) 4, 18, 19, 20

Edelman v. Jordan, 94 S.Ct. 1347 (1974) 4, 9, 13, 29
Ewing v. Gardner, 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951) 3, 14, 15

PAGE

Federal Housing Administration Region No. 4 v. Burr, 309 U.S. 242 (1940) 3, 8, 13
Flemming v. Nestor, 363 U.S. 603 (1960) 5, 7
Fletcher v. Peck, 6 Cranch 87 (1810) 22

Goldberg v. Kelly, 397 U.S. 254 (1970) 6
Graham v. Richardson, 403 U.S. 365 (1971) 2

Hawaii v. Gordon, 373 U.S. 57 (1963) 18, 20

Kennecott Copper Corp. v. State Tax Com'n, 327 U.S. 573 (1946) 6

Land v. Dollar, 330 U.S. 731 (1947) 3, 18, 19, 20-21
Lane v. Hoglund, 244 U.S. 174 (1917) 23
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 20, 21

Marbury v. Madison, 1 Cranch 137 (1803) 22, 23
Miguel v. McCarl, 291 U.S. 442 (1934) 7, 8, 23, 24
Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1959) 25, 26, 28

Noble v. Union River Logging R. Co., 147 U.S. 165 (1893) 23
North Carolina v. Temple, 134 U.S. 22 (1890) 21

O'Connor v. Rhodes, 79 F.2d 146 (D.C. Cir. 1935), *aff'd per curiam* 297 U.S. 383 (1936) 8
Ortwein v. Schwab, 410 U.S. 656, *reh. den.*, 411 U.S. 922 (1973) 2
Osborn v. Bank of United States, 9 Wheat. 738 (1824) 22

PAGE

Philadelphia Company v. Stimson, 223 U.S. 605 (1912) 8
Porter v. Warner Holding Co., 327 U.S. 395 (1947) 3, 23, 24, 25, 26, 27, 28

Reagen v. Farmers Loan & Trust Co., 154 U.S. 362 (1894) 21
Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900) 23
Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972) 9

Simmons v. Wagner, 101 U.S. 260 (1880) 23
Social Security Board of Nierotko, 327 U.S. 358 (1946) 28

United States v. Lee, 106 U.S. 196 (1882) 4, 5, 8, 18
United States v. Moore, 340 U.S. 616 (1951) 27

Weinberger v. Diaz, October Term, 1974 2
Woods v. Gardner, 286 F. Supp. 648 (1968) 9
Work v. United States ex rel. Lynn, 266 U.S. 161 (1924) 23
Work v. United States ex rel. McAlester, etc., Co., 262 U.S. 200 (1923) 23
Work v. United States ex rel. Rives, 267 U.S. 175 (1925) 23

Constitutional Provisions:

United States Constitution

Fifth Amendment 5, 6, 22

Eleventh Amendment 4, 29

Fourteenth Amendment 5, 6

PAGE

Statutes:

28 U.S.C. §1346 19
29 U.S.C. §217 28
42 U.S.C. §401(a) 10, 11
42 U.S.C. §401(a)(1)(2)(3) and (4) 12
42 U.S.C. §401(b) 10
42 U.S.C. §401(c) 11
42 U.S.C. §401(d) 10, 12, 14
42 U.S.C. §401(h) 13
42 U.S.C. §402 10
42 U.S.C. §402(j)(1) 17
42 U.S.C. §415(a) 10
42 U.S.C. §423(b) 17

Social Security Act of 1950

Act Aug. 28, 1950 c. 809, Title I, §109(a) 64 Stat. 521 11

Other Authorities:

48 Comp. Gen. 479 (1968) 16
48 Comp. Gen. 477 (Jan. 17, 1969) (Comp. Gen's Op. No. A-80185) 16

1 Pomeroy's Equity Jurisprudence §§231, 236(a) 25
4 Pomeroy's Equity Jurisprudence §1359 26

Restatement of the Law, Restitution 1 (1937) 26

Social Security Earning Record (OASI—93, July 1966) 21 12
Social Security Earning Record (OASI—93, August 1964) 5 12
Social Security Programs in the United States, U. S. Dept. of HEW, Social Security Administration, 23 10

IN THE

Supreme Court of the United States

No. 74-214

OCTOBER TERM, 1974

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare; United States Department of Health, Education, and Welfare; FERNANDO E. C. DEBACA, Director of Region Nine of United States Department of Health, Education, and Welfare; JOHN F. RICHARDSON, Commissioner of Region Nine of the Social Security Administration; Social Security Administration,

Appellants,

—v.—

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, *AMICUS CURIAE*

Interest of the *Amicus*

Legal Services for the Elderly Poor is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the

Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly Poor has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court involving the elderly, including *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Allied Chemical Workers* v. *Pittsburgh Plate Glass,* 404 U.S. 107 (1971); *Ortwein* v. *Schwab,* 410 U.S. 656, *reh. den.,* 411 U.S. 922 (1973); and *Weinberger* v. *Diaz,* October Term, 1974.

All parties have consented to the filing of this *amicus* brief. Originals of the consents are annexed.

Questions Presented

In a case where the Social Security Administration wrongfully and unconstitutionally withheld entitlements from an otherwise eligible widow and daughter:

1) Can the Social Security Administration while administering a Special Trust Fund based solely on beneficiary and employer contributions refuse to pay entitlements retroactively to the date of eligibility on the basis of sovereign immunity?

2) Does the judicially created defense of Sovereign Immunity bar retroactive payments when:

a) no State-matching funds exist;

b) the contributed funds are in a Special Trust Fund and no funds would be expended from the U. S. Treasury;

c) where Congress in the Social Security Act has authorized retroactive benefits to those who have failed or neglected to file on time.

Statement of the Case

The case is stated adequately in the parties' briefs.

Summary of Argument

In granting appellees the entitlements they would have received but for the unconstitutional statutory provision, the District Court was simply "ordering the return of that which rightfully belong[ed] to [them]." *Porter* v. *Warner Holding Co.,* 327 U.S. 395, 402 (1947).

A Social Security recipient is entitled to benefits from the appropriate time of application regardless of timing and method of payment. See, *e.g., Ewing* v. *Gardner,* 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951).

Contributions in the possession of a Special Trust Fund separate from General Treasury funds and also from Treasury control are subject to execution by the District Court. *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242, 250 (1940); *Land* v. *Dollar,* 330 U.S. 731, 738 (1947).

The judicially created principle of Sovereign Immunity does not apply in a case such as this one where the Treasury and property of the United States are not affected.

The judicially created exceptions to the doctrine of sovereign immunity are clearly met in the instant case. *Dugan* v. *Rank,* 372 U.S. 609, 622-623 (1963).

This case does not involve State-matching funds nor does it concern itself with the Eleventh Amendment. The relief granted by the District Court does not place a substantial financial burden on a State Treasury nor force the reallocation of scarce welfare funds depriving persons truly in need of present benefits in order to correct past wrongful practices. *Cf., Edelman* v. *Jordan,* 94 S.Ct. 1347, 1357, n. 11 (1974).

POINT I

Sovereign immunity cannot be a defense against an award of retroactive monetary relief from the specially constituted Social Security Trust Fund.

i

General Conditions

Just as the doctrine of standing places a premium upon the selection of a proper plaintiff, the various doctrines of immunity require that attention be given to the selection of appropriate defendants. Although the judicial discussion of immunity is substantial, no general theory of immunity has emerged.[1] Consequently, immunity must be approached from the standpoint of the *particular* defendant.

[1] It was not until 1892, in *United States* v. *Lee,* 106 U.S. 196 (1882), that the Court thoroughly examined the doctrine, the reasons for it, and substantially limited its application. *Lee* qualified *earlier* holdings to the effect that where a judgment affected the property of the United States the suit was in effect against the United States, by holding that title to the Arlington, estate of the Lee family, then being used as a national cemetery, was not legally

The Fifth and Fourteenth Amendments to the Constitution created rights in individuals which may not be nullified by the government's assertion of immunity under the legal fiction of sovereign immunity.[2] The government's

vested in the United States but was being held *illegally* by army officers under an *unlawful* order of the President. In reviewing the sources and application of the rule of sovereign immunity the Court concluded that the rule "is not permitted to interfere with the judicial enforcement of the rights of plaintiff[s] when the United States is not a defendant or a necessary party to the suit." *Id.,* at 207-208.

The principle of sovereign immunity was discussed by both the majority and dissenting opinions on the subject of the rule of law:

> Under our system, the people * * * are sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. (*Majority,* Mr. Justice Miller) *Id.* at 208-209.

The rationale for sovereign immunity was stated by the dissent, Mr. Justice *Gray*:

> [I]t is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion, of custom's houses and revenue cutters, employed in the collection of revenue; or of lighthouses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country. *Id.,* at 226.

[2] In *Flemming* v. *Nestor,* 363 U.S. 603 (1960), the Court recognized with respect to Federal Social Security benefits that: "The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611.

> "The 'right' to Social Security benefits is in one sense 'earned'." *Id.,* at 610, and that "[t]he extent to which procedural due

immunity under sovereign immunity was curtailed by the creation of individual rights in the Fifth and Fourteenth Amendments.

> "Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. 'It is,' wrote Lincoln in his First Annual Message, 'as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.' 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued, though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the state.
>
> Not so long ago this Court acted on the realization that 'the present climate of opinion . . . has brought governmental immunity from suit into disfavor.' *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381 . . . ." Mr. Justice Frankfurter, dissenting *Kennecott Copper Corp.* v. *State Tax Com'n*, 327 U.S. 573, 580 (1946).

process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' • • • Accordingly • • • 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'." *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970).

The Social Security Administration is an independent agency with adequate autonomy so as not to be the mere alter ego of the government and, consequently, is unable to avail itself of sovereign immunity generally. It possesses several other traits from which it can be found that it is an independent agency.[3] The Social Security Administration has its own source of funds from which it must first pay for the needs of the eligible people. An order directing the Social Security Administration to pay its due and owing back welfare benefits will not diminish the United States Treasury.[4] In *Miguel* v. *McCarl*, 291 U.S. 442 (1934) the

[3] *Cf. Flemming* v. *Nestor, supra,* at 631-632, dissenting opinion, Mr. Justice Douglas:

> "Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. • • •. The funds are placed in the Federal Old Age and Survivors Insurance Fund, 42 U.S.C. §401(a), 42 U.S.C.A. §401(a); and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made. • • •. As the late Senator George, long Chairman of the Senate Finance Committee and one of the authors of the Social Security System, said: • • • [W]e have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity. • • •
>
> • • • • •
>
> "Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self respect. 102 Cong. Rec. 15110."

[4] *Cf., Carter* v. *Butz*, 479 F.2d 1084 (3d Cir. 1973); *Bermudez* v. *United States Department of Agriculture*, 490 F.2d 718 (D.C. Cir. 1973), holding the federal government liable for retroactive benefits in the form of forward adjustments for wrongfully withheld Food Stamp Act benefits.

> "[T]his case does not involve liability for additional expenses incurred by the federal government. This case involves bene-

Supreme Court affirmed a mandatory injunction against a federal disbursing officer requiring him to pay retroactive retirement allowances to which Miguel was entitled by law. The holding that the duty was mandatory rather than discretionary was made even though the Comptroller General had ruled to the contrary on the merits.

The funds sought to be recovered are earmarked for a special purpose in the hands of the Trustees of the Social Security Administration, and no interests of the United States Government would be affected by a decree in this suit. The fact that Congress has authorized the funds to be used for purposes of the Social Security Act does not change its character or the rights of the parties. This is not a suit against the United States. *Cf. O'Connor* v. *Rhodes,* 79 F.2d 146, 152 (D.C. Cir. 1935) *aff'd per curiam* 297 U.S. 383 (1936), citing as authority, *Philadelphia Company* v. *Stimson,* 223 U.S. 605 (1912); *Miguel* v. *McCarl,* 291 U.S. 442 (1934); *United States* v. *Lee,* 106 U.S. 196 (1882). See also, *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242 (1940).

> "[T]he result is that only those funds which have been paid over to the Trustees and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution." *Id.,* at 250.

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fits for which the federal government is responsible but which were not paid out earlier. * * * We hold that the federal government is liable for retroactive food stamp benefits." *Bermudez, Id.* at 723.

ii

Purposes and Functions of Social Security

The basic objectives of the Social Security Act are keeping individuals and families from becoming destitute due to loss of earnings, protecting older persons against the expenses of illness that would otherwise exhaust their savings, keeping families together, and giving children the opportunity to grow up in health and security. *Dalno* v. *Celebrezze,* 347 F.2d 159 (9th Cir. 1968); *Woods* v. *Gardner,* 286 F. Supp. 648 (1968); *Chernock* v. *Gardner,* 360 F.2d 257 (3rd Cir. 1966). The various programs attempt to prevent destitution and poverty rather than to relieve those conditions after they occur.

Only four programs are funded entirely by the federal government: old age, survivors, disability, and health insurance (OASDHI). These benefits are paid under a social insurance program administered by the Social Security Administration, a federal agency. Unlike the situation in *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974) no state matching funds exist.[5]

Throughout the development of the OASDHI program, certain basic principles have been adhered to:

(1) Security for the worker and his family grows out of his own work. A worker's entitlement to benefits is based on past employment, and the amount of cash benefits he and his family will get is related to his earnings in covered

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[5] *Cf. Rothstein* v. *Wyman,* 467 F.2d 226 (2d Cir. 1972) which, of course, also involved State funds at 231 (for the substantial amount of funds and administrative costs involved) and 235 (for the time problems and the question of recoupment of misspent funds).

work. In general, the more he earns the greater his protection; 42 USC §415(a);

(2) These benefits are an earned right for that family. They are paid regardless of income from savings, pensions, private insurance, or other forms of non-work income. An insured worker knows beforehand that he will not have to prove that he is needy in order to receive benefits 42 USC §402;

(3) The concept of an earned right is reinforced by the fact that workers make contributions to help finance current benefits. See *Social Security Programs in the United States,* U. S. Dept. of HEW, Social Security Administration, p. 23 and 42 USC §401(a) and (b).

The program is financed by taxes paid by employers and employees in the various fields of employment covered by the Act, the tax being on the earnings or wages of the employees. The tax rate is set by Congress in an amount intended to be sufficient over the long-range future to enable the program to pay the benefits provided when they fall due 42 USC §401(a)(1)(2)(3) and (4). Funds not needed for current benefit payments and administrative expenses are accumulated in trust funds which are invested in interest-bearing securities of the U. S. Government. 42 USC §401(d).

It must be stressed that the American system of old-age, survivors, disability and health insurance has emphasized a principle not found in some of the social insurance programs of other countries. In contrast to some programs that are financed in part by general revenues of the government, the OASDHI program is financed entirely through contributions by employees, and their employers, without subsidy from the general revenues of the government. In

fact, when Congress amended the Social Security Act in 1950, Act Aug. 28, 1950 c. 809, Title I, §109(a) 64 Stat. 521, it specifically rejected the idea of government contribution. As a result, the cost of financing the accrued liability is met solely from the payroll contributions of employers and employees.

The taxes collected are placed in trust funds: The Federal Old-Age and Survivors Insurance Trust Fund, the Health Insurance Trust Fund, and the Federal Disability Insurance Trust Fund. See 42 USC §401(a). The money in these funds not currently needed to pay benefits or administrative expenses is invested in United States government securities and obligations and draws interest, which is added to the funds. 42 USC §401(a). The tax rates plus the interest earned on the investments are intended to provide sufficient income to meet the anticipated expenditures for benefits and administrative costs into the future.

The trust funds may, therefore, be said to serve two primary purposes:

(1) They produce income from the investment in government securities and thus help defray some of the costs of the program;

(2) They constitute contingency reserves which can be used in years when expenditures exceed income.

The trust funds are managed by a board of trustees, composed of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of HEW. The Commissioner of Social Security serves as Secretary of the Board of Trustees. The Secretary of the Treasury is the managing trustee and is charged with the responsibility of investing and disbursing the funds. 42 USC §401(c).

The trust funds are kept completely *separate and apart* from other funds in the general treasury. A certain amount is kept in cash sufficient to take care of the current cash expenditures; the remainder is invested in government securities. 42 USC §401(d). This fact is stressed in several Social Security Administration publications:

> The basic idea of old-age, survivors and disability insurance is a simple one. During working years, employees, their employers and self-employed people pay social security taxes which go into *trust funds.*
>
> Then, when earnings stop because of the worker's retirement in old age, his disability, *or his death,* payments are made *from the funds* to the worker and his dependents or to his survivors.
>
> *Your Social Security Earning Record* (OASI—93, August 1964) at 5. See 42 USC §401(a) (1) (2) (3) and (4).
>
> Under the law, the money in the trust funds can be used only to pay social security benefits and the costs of administering the retirement, survivors, disability and health insurance programs. Money not immediately needed for benefit payments and administrative expenses is, by law, invested in Federal securities which earn interest for the trust funds.
>
> Contributions . . . , with interest earnings from the trust fund's investment, maintain the financial soundness of the retirement, survivors, and disability insurance and hospital insurance program.
>
> *Your Social Security Earning Record* (OASI—93, July 1966), at 21.

iii

Individual Equities and Governmental Prerogatives

When Social Security has withheld benefits, otherwise due and owing but for an unconstitutional statute, the injured party should be able to recover the true value of the benefits withheld. Such an individual should have an adequate judicial remedy against the governmental agency, notwithstanding the doctrine of Sovereign Immunity.

A special reserve fund has been created from the various Social Security taxes, out of which only social security benefits and administrative expenses may be paid. This trust fund contains 100% of the social security taxes, and only this money so collected can be used to pay social security benefits. As this Court pointed out in an analogous situation in *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242, 250 (1940):

> [T]he result is that only those funds which have been paid over to the Trustees and which are in its possession, severed from Treasury funds, and Treasury control, are subject to execution. 42 USC §401(h).

Given this system, there is no reason to protect the governmental agency from the legitimate claims of its citizens, as any restitution will be paid not from the government's general revenues, but from those funds specifically provided to meet such a contingency. As was pointed out by the majority in *Edelman, supra* a major factor distinguishing prospective relief from its retroactive counterpart is that the former at least provides a legislature with the opportunity to allocate its revenues in light of the court-ordered relief, thus facilitating both fiscal planning and adminis-

trative flexibility. In the present case, however, this rationale is inapposite, for Congress has in fact already provided a financial reserve to cover such costs. 42 USC §401(d). Thus, the administrative flexibility necessary to any program is guaranteed here by funds designed to absorb just such contingent administrative payments.

Thus, if an applicant for benefits is denied aid on the basis of an eligibility condition subsequently found to be invalid under the Secial Security Act or the Constitution, he should be able to obtain benefits retroactive to the date when he would otherwise have received aid as a matter of right, *i.e.*, the date of his application. This principle, that an applicant should be paid benefits from the time certain specified conditions actually exist and not from the time that the administrative agency finally determines that they do, finds support from several sources. In *Ewing* v. *Gardner,* 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951) per curiam, except as to taxation of costs, a fully insured wage earner did not prove that he was 65 when he filed his application for benefits under SSA though satisfactory proof was subsequently furnished by the wage earner's executor. The court found that the facts necessary under the statute to entitle the wage earner to receive monthly primary insurance benefits *actually existed,* and his right to monthly primary insurance benefits accrued, *at the time the application was filed.*

In *Ewing, supra,* the applicant did not overcome the presumptive conclusion at time of application, but the Sixth Circuit indicated that if the conditions were met, or as in the present case, a disqualifying condition deemed unconstitutional, it would follow that retroactive benefits be made.

Similarly, in *Anderson* v. *United States,* 205 F.2d 326 (9th Cir. 1953), a widow filed a proper application for an annuity under a statute granting annuities to certain civilian officials and employees who were engaged in and about construction of the Panama Canal during the construction period, or to their widows. However, the widow died shortly after *receipt* of her application was acknowledged. An action by the executor of the widow's estate against the United States for an accrued annuity was denied by the District Court on the grounds that the widow had no right *until* the claim was adjudicated by the Commission. (112 F. Supp. 524). The Court of Appeals reversed this decision, placing reliance on *Ewing* v. *Gardner, supra*:

> When does this right accrue? * * * The court below was of the view that the annuitant can have no right to the annuity until the claim is *adjudicated* (emphasis by Court) by the Commission and a certificate issued. We do not agree. When the annuitant has filed a proper application he has done all that he is required to do. The right must accrue at that time. *Cf., Ewing* v. *Gardner* * * *. at 329.
>
> * * * * *
>
> Mrs. Anderson's right to the annuity was perfected when she filed proper application for it. Inaction or denial of the claim by the Commission could not delay or defeat the right, and favorable adjudication, evidenced by the issuance of an annuity certificate, could only formally acknowledge a right already established. * * *. at 330.

The federal government itself has acknowledged, and even advocated, the same principle. In 1968, the Department of Health, Education, and Welfare (in seeking a rul-

ing) argued before the Comptroller General that federal matching funds for state public assistance programs should be made available to the states for the period between an applicant's date of filing and the state agency's eventual certification of eligibility. Two of the arguments relied on by HEW to support its position were:

> Under principles of equity an eligible individual should have his needs met from the date of his application. It is not consistent with principles of equal protection underlying State public assistance programs, if two eligible individuals with equal need for assistance apply on the same date and receive different amounts because a determination is made with respect to one in the month his application was filed but with respect to the other in the next month. The speed of the administrative process does not appear to be a reasonable basis for distinguishing between the two.
>
> In *Ewing* v. *Gardner,* 185 F.2d 781 (1950), the court held that an individual is entitled to social security benefits when he meets the statutory conditions and has filed an application for benefits. Since, his entitlement begins when the specified conditions exist and not when the administrative agency makes its determination that they, in fact, exist, payments back to the date of application are required. 48 Comp. Gen. 479, at 479 (1968).

Relying on HEW's arguments, the Comptroller General ruled that federal matching funds should be provided in the given circumstances. Comptroller General's Opinion No. A-80185, 48 Comp. Gen. 477 (January 17, 1969). Thus, the government itself has embraced the equitable principle that an applicant eventually proven eligible should receive

benefits from the time of application. (See general discussion, *infra* II, iii).

Finally, it must be stressed that this is not an area where Congress has explicitly demonstrated that the federal courts should depart from the traditions of equity. To the contrary, Congress has authorized retroactive benefits under the Social Security Act to those who have failed or neglected to file on time:

> An individual who would have been entitled to [old age or survivors insurance] benefits . . . for any month . . . and filed application therefor prior to the end of such month, shall be entitled to such benefit for such month if he filed application therefor prior to the end of the twelfth month immediately succeeding such month. 28 U.S.C. §402(j)(1).

Under this section, if an applicant becomes entitled to benefits on January 1, 1975, and is then fully insured, but does not file an application until January 1, 1976, he may be entitled to those benefits retroactively beginning with the month of January, 1975. A similar statutory provision also exists in regard to disability insurance (§423 (b)), further demonstrating the government's commitment to paying benefits from the time they actually become due.

Thus, it has been demonstrated that this is not a case where retroactive benefits should be barred by the doctrine of Sovereign Immunity. No funds from the general public coffers are at stake in this action. Further, legislative provision has been made to cover such contingent costs. Finally, all three branches of the federal government have expressed the policy that benefits should be paid when actually due, not merely when they are finally deter-

mined to be so by a given agency. In light of these considerations, retroactive benefits should be granted in the present case.

POINT II

The case law demonstrated that the defense of sovereign immunity does not apply here.

i

Leading Cases

Neither *Land* v. *Dollar,* 330 U.S. 731 (1947); *Dugan* v. *Rank,* 372 U.S. 609 (1963); nor *Hawaii* v. *Gordon,* 373 U.S. 57 (1963) bar this suit or the recovery sought. *Land* v. *Dollar, supra,* reaffirmed the rule of *United States* v. *Lee, supra,* that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[6]

In fact, in *Land* v. *Dollar, supra,* the Court suggested that if the allegations were met the interest of the Sovereign would be to allow suit and provide full relief:

> [P]ublic officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money

[6] "[I]f the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority or public offices." *Id.* at 738.

> judgment. *The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld. Id.* at 738. (Emphasis added.)

Dugan v. *Rank, supra,* involved an action by riparian and overlying owners to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River in contravention of their rights to beneficial use of the waters of the river below the dam. The United States was joined as a party defendant. The District Court (142 F. Supp. 1) granted injunctive relief. The Court of Appeals (293 F.2d 340 and 307 F.2d 96) reversed as to the United States but affirmed as to officials of the reclamation project. This Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an action against the United States; for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. It was further held that damages were recoverable in a suit under the Tucker Act (28 U.S.C. 1346).

Although the factual situation in *Dugan* v. *Rank, supra,* in no way parallels the present case, the Court's decision to apply sovereign immunity was made easier by the pleadings of the landowners and the decision of the Court of Appeals.

> [T]he fact that the Court of Appeals characterized the action of the officers as a 'trespass' does not at all establish that it was either unconstitutional or unauthorized. * * * The power to seize which was granted here had no limitation placed upon it by Congress, nor did the Court of Appeals bottom its conclusion on a finding of any limitation. *Id.*, at 622-623.

However, the Court was specific in stating the exceptions to the doctrine of sovereign immunity, not met in *Dugan,* but clearly met in the instant case:

> Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Id.*, at 621-622.

Hawaii v. *Gordon, supra,* involved an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that state. In a *per curiam* opinion the Court dismissed the suit finding that the relief requested would involve "the disposition of property admittedly belonging to the United States." *Id.*, at 58. Of course, the suit did not allege that the officer was acting pursuant to an unconstitutional statute nor exceeding his authority. While it is true that suits *may* fail if relief requires the disposition of unquestionably sovereign property or the expenditure of funds from the Treasury.[7] *Land* v. *Dollar,*

[7] *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The *Larson* case has been felt by some to give a renewed vitality to the doctrine of sovereign immunity. But the case was

supra. The property for which a disposition is presently requested was based on contributions by Londo L. Salfi during his lifetime to the Social Security Administration as trustee for his survivors.

The governmental interest is, therefore, not pecuniary since the funds will not be coming out of its general treasury and none of its property will be affected by court decree. In *Reagen* v. *Farmers Loan & Trust Co.*, 154 U.S. 362 (1894), a former owner of property in the hands of the United States obtained specific relief by demonstrating that the property was not taken for a public use. It is in-

---

within two of the categories in which the doctrine has characteristically operated: enforcement of a contract and an equitable claim against government property.

Larson recognizes that a suit may be brought against an officer if the officer has acted "unconstitutionally" or "ultra vires his authority." But two qualifications in Chief Justice Vinson's opinion have caused trouble. The mere allegation that the officer, acting officially, *wrongfully* holds property to which the plaintiff has title does not meet the requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. And even more troublesome is footnote eleven:

> Of course a suit *may* fail * * * if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple,* 134 U.S. 22 (1890).

If the *may* is read as *may* and not as must, it is unobjectionable.

It has been suggested that this footnote means that a suit will fail if the relief requested would involve the disposition of government property. But the footnote does not make that statement. Rather, its meaning is that a suit must fail if it would require the sovereign to dispose of its property—sovereign action, in other words. That meaning is borne out by the one citation made. For an excellent discussion of this interpretation of footnote eleven, see *Clackamas County, Oregon* v. *McKay,* 219 F.2d 479, 492-493 (D.C. Cir. 1954).

conceivable that Congress would forbid an action to recover property taken in violation of the Fifth Amendment.[8]

Yet, this is the very substance of appellant's argument. A court of equity has the power to prevent transfer of property so that it will not be lost to its owner. *Osborn* v. *Bank of United States,* 9 Wheat. 738 (1824). As Chief Justice Marshall stated in *Fletcher* v. *Peck,* 6 Cranch 87 (1810):

> When, then, a law is in the nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling the, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired may be seized without compensation? To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection.

He continued in *Marbury* v. *Madison*:

> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation

[8] See *Anniston* v. *Davis,* 301 U.S. 337, 351 (1951) "We cannot attribute to Congress an intent to defy the Fifth Amendment * * *." *Cf. Berman* v. *Parker,* 348 U.S. 26 (1954).

> of a vested legal right . . . [w]here a specific duty is assigned by law, and *individual rights* depends upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. 5 U.S. at 69-70. (Emphasis added.)

Many cases, following *Marbury* v. *Madison,* 1 Cranch 137 (1803), have established that courts have power to compel an executive officer to perform a purely ministerial act which the Congress has directed him to perform. See discussion in *Noble* v. *Union River Logging R. Co.,* 147 U.S. 165 (1893); *Work* v. *United States ex rel. Rives,* 267 U.S. 175 (1925). That rule has been applied in a great variety of cases, including some which involved land of the United States: *Work* v. *United States ex rel. McAlester, etc., Co.,* 262 U.S. 200 (1923); *Lane* v. *Hoglund,* 244 U.S. 174 (1917); *Simmons* v. *Wagner,* 101 U.S. 260 (1880); payments out of the Treasury of the United States: *Roberts* v. *United States ex rel. Valentine,* 176 U.S. 221 (1900); *Work* v. *United States ex rel. Lynn,* 266 U.S. 161 (1924); *Miguel* v. *McCarl,* 291 U.S. 442 (1934); and other similar matters in respect to which courts have no general power.

In the absence of an explicit demonstration that Congress wishes to depart from the tradition of equity, the Court may invoke its powers in the public interest in "an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.,* 327 U.S. 395, 398 (1946). This includes the inherent power to bring in all the interested parties as well as the ability to fashion remedies.

ii

The Relief Requested Cannot Be Characterized as Damages Against the Sovereign

Appellants characterize the relief awarded below as "damages" barred by sovereign immunity, and thus seek to bring the district court's judgment within the purview of this doctrine. However, the remedy afforded below was that of restitution, which "differs greatly from the damages and penalties which may be awarded." *Porter* v. *Warner Holding Co., supra,* at 402. Appellees here do not seek relief for consequential damages caused by appellant's failure to disburse their full statutory entitlement in a timely manner. Rather, incident to the injunctive relief prayed for, they ask that exactly measured benefits retained by appellants, which would have been paid out but for a violation of the federal law and Constitution, be paid over to them.

In an injury specific and liquidated within the affected class, all individual claims are for specific liquidated amounts. *Cf. Miguel* v. *McCarl,* 291 U.S. 442 (1934); *Clackamas County, Oregon* v. *McKay,* 219 F.2d 479 (D.C. Cir. 1954). Thus, here, retroactive adjustments would not add to the already budgeted administrative expense but would disburse those monies which comprise the full measure of the statutory entitlement. *Cf. Carter* v. *Butz,* 479 F.2d 1084 (3rd Cir. 1973); *Bermudez* v. *U.S. Dept. of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973).

iii

Equitable Authority

The order by the lower court in this case that benefits, from the time of original entitlement, to plaintiffs and the class they represent, is a remedy in the form of an award of retroactive benefits is entirely consistent with the equitable authority of federal courts generally to apply all appropriate remedies. This Court's decisions in *Porter* v. *Warner Holding Co.,* 327 U.S. 395 (1947), and *Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288 (1959), make clear that all of the inherent equitable powers of the federal courts are available for the proper and complete exercise of equity jurisdiction, and federal courts may give whatever relief necessary under the circumstances:

> "The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann,* 10 Pet. 497." *Porter, supra,* at 398.

The reasons for this are apparent from the nature of equity jurisdiction, which has always been to secure complete justice. 1 Pomeroy's Equity Jurisprudence §§231, 236(a); *Porter* v. *Warner Holding Co., supra,* at 398. Courts may thus, pursuant to their general equity jurisdiction,

not only order compliance with congressional acts in the future but may also compel by means of an order for restitution a return to the situation which would have existed had the congressional will not been violated. *Id.*, at 402; 4 Pomeroy's Equity Jurisprudence §1359. Without such power equity could not secure "complete rather than truncated justice." *Porter, supra,* at 398.

The purpose of the particular equitable remedy of restitution is to secure for the plaintiff that to which she or he is justly and in good conscience entitled, and to prevent the unjust enrichment of the defendant. Restatement of the Law, Restitution 1 (1937). The exercise of equitable jurisdiction by a federal court is by its very nature within that court's sound discretion. As this Court has made clear, however, where the equitable remedy of restitution will restore the injured parties to the situation they would have been in but for the statutory violation in question, and unless in opposition to the Congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement." *Mitchell, supra,* at 296.

As such it is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co., supra,* at 402.

Porter involved the power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The lower court had held that there was no authority under the statute to order restitution. This Court reversed, stating that *unless* contrary legislative intent could be demonstrated, all the inherent equitable powers of the district courts are available for the proper exercise

of equity jurisdiction. The Court specifically found the particular equitable remedy sought, restitution of back rents, a proper exercise of equitable discretion under two theories: as necessary to restore ill-gotten gains (the traditional criterion for restitution) and as necessary to advance the statutory purpose of the Emergency Price Control Act:

> "(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief . . . [w]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . .
>
> [and]
>
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.*, at 399-400 (citations omitted).

See also *United States* v. *Moore,* 340 U.S. 616 (1951).

Mitchell v. *DeMario Jewelry, Inc., supra,* made clear that *Porter* does not limit a court's authority to grant equitable restitution to situations where either express or implied congressional intent can be discerned. *Mitchell* involved a federal court's authority to order restitution of lost wages to employees discharged in violation of the Fair Labor Standards Act. This Court reiterated the principles set forth in *Porter,* and held, despite statutory language which provided that no court should have jurisdiction to "order the payment to employees of unpaid minimum wages or unpaid overtime compensation," 29 U.S.C. §217, that Congress had not intended to limit the courts' traditional equitable powers. The legislative history of §217 was employed, as in *Porter,* merely to confirm that result. *Mitchell,* at 292. Restitution of lost pay was then held to be proper in order 1) to restore the employees to the condition they would have enjoyed had the employer not violated the Act, and 2) to effectuate the purposes of the Act by encouraging employees to report violations of the Act without risk of losing their entire pay during the period necessary to obtain reinstatement.

The thrust of *Porter* and *Mitchell* is that equitable restitution is within the power of the federal courts and is properly ordered to restore ill-gotten gains and advance the statutory purpose.

In granting appellees the benefits they would have received but for the illegal statute, the district court was therefore simply "ordering the return of that which rightfully belong[ed] to [them]." *Porter, supra,* at 402.[9]

[9] *Cf. Social Security Board of Nierotko,* 327 U.S. 358 (1946). The Court stated that back pay awarded to an employee under the National Labor Relations Act for the period which he was wrongfully separated from his job is not a fine or a penalty imposed on the employer but the reinstatement and back pay are for the protection of the employees and the redress of their grievances to make them whole.

iv

The Possible Fiscal Consequences to the Social Security Administration Is Not Sufficiently Burdensome to Raise a Sovereign Immunity Defense to an Award of Such Relief

The factors that proved decisive in this Court's recent decision, *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974), are lacking in the instant case. This case, of course, does not involve state funds nor does it concern itself with the Eleventh Amendment. An award of the relief sought by appellees would not have the effect of placing a substantial financial burden on a state treasury and would not force the reallocation of scarce welfare funds that might result in depriving persons truly in need of present benefits in order to correct past wrongful practices.[10]

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

Respectfully submitted,

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[10] *Edelman, supra,* at 1357, n. 11.

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IN THE SUPREME COURT OF THE

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Appellees

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INDEX

	Page
Introduction.....	2
Summary of Argument...	3
Argument.....	4
Individualized Notice To Members Of The Class Is Not Required In This Case.....	4
Conclusion.....	27
Consent of Parties To Filing Brief Amicus Curiae.....	29

CITATIONS

Cases:

Almenares v. Wyman, 334 F.Supp. 512 (S.D. N.Y. 1971).....18, 23, 24
Arey v. Providence Hospital, 55 F.R.D. 62 (D.D.C. 1972)..... 11
Baxter v. Savannah Sugar Refining Co., 350 F.Supp. 139 (S. D. Ga. 1972)..13, 23
Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).....12, 23
Citizen's Environmental Council v. Volpe, 364 F. Supp. 286 (D. Kan. 1973), aff'd, 484 F.2d 870 (10th Cir. 1973)..... 13

Cases con.: Page

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)..... 4, 19, 23, 25, 26

Germonprez v. Director of Selective Service, 318 F.Supp. 829 (D.D.C. 1970)... 21

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973)..... 10, 16, 17, 18

Gregory v. Hershey, 311 F.Supp. 1 (E. D. Mich. 1969), rev'd., 436 F.2d 513 (6th Cir. 1971), cert. den., 403 U.S. 922 (1971)..... 20, 22

Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972)..... 12

Johnson v. Baton Rouge, 50 F.R.D. 295 (E. D. La. 1970)..... 13

Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir.1969)..... 12

Hannah v. Plumer, 380 U.S. 460..... 6

Hansberry v. Lee, 311 U.S. 32.....12, 15, 16

Housing Auth. of the City of Omaha v. United States Housing Auth., 54 F.R.D. 402.. 10

Lynch v. Household Finance Co., 360 F. Supp. 720 (D. Conn. 1973).....13, 26, 27

Cases con.: Page

Mersey v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968) 18

Moss v. Lane Co., 50 F.R.D. 122 (W. D. Va. 1970)..... 13

Mungin v. Florida E. Coast R.R. Co., 318 F.Supp. 220 (M. D. Fla. 1970)..... 13

Northern Natural Gas v. Grounds, 292 F.Supp. 619 (D. C. Kan. 1968, rev'd. in part on other grounds, 441 F.2d 704 (10th Cir. 1971)..... 12

Owens v. Roberts, 377 F.Supp. 45 (N. D. Fla. 1974)..... 23

Pasquier v. Tarr, 318 F.Supp. 1350 (E. D. La. 1970), aff'd., 444 F.2d 116 (5th Cir. 1971)..... 20, 21, 22, 23

Richardson v. Fargo, 61 F.R.D. 641 (E. D. Pa. 1974)..... 13

Rosado v. Wyman, 322 F.Supp. 1173 (E.D.N.Y. 1969), aff'd., 437 F.2d 619 (2d Cir. 1970), aff'd., 402 U.S. 991 (1971).. .....13, 23, 24, 25

Serritella v. Engelman, 339 F.Supp. 738 (D.N.J. 1972), aff'd., 462 F.2d 601 (3d Cir. 1972)..... 18

Cases con.: Page

Shane v. Northwest Industries, Inc., 49 F.R.D. 46 (N.D. Ill. 1970).... 13
Schrader v. Selective Service System, Local Bd. 76, 470 F.2d 73 (7th Cir. 1972)..... 20, 22
Solman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969), aff'd., 396 U.S. 5 (1970).... 13
Vasquez v. Superior Court, 4 Cal.3d 800.. 8
Vaughns v. Board of Ed. of Prince George's Cty., 355 F.Supp. 1034 (D. Md. 1972)..... 12
Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972)..... 12
Williams v. Local 19, 59 F.R.D. 49 (E. D. Pa. 1973)..... 13
Woodward v. Rogers, 344 F.Supp. 974 (D.D. C. 1972).....11, 12
Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972)..... 20

Statutes and Rules:

42 USC § 2000e et. seq. .. 11
Rule 23(b)(2), Fed. R. Civ. Proc. .....3, 5, 7, 8, 9, ... 10, 11, 12, 16, ... 20, 24, 27
Rule 23(b)(3), Fed. R. Civ. Proc..... 4, 7, 8, 24

Statutes and Rules con.: Page

Rule 23(c)(2), Fed. R. Civ. Proc..... 4, 5
Rule 23(d)(2), Fed. R. Civ. Proc..... 3, 6, 10
Rule 24(a), Fed. R. Civ. Proc..... 10

Miscellaneous:

Advisory Comm. on Federal Rules, Notes, 39 F.R.D. 69..... 7
Comment, "Constitutional & Statutory Requirements of Notice Under Rule 23(c)(2)," 10 B.C. IND. & COMM. L. REV. 571 (1969)..... 14
Comment, "Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws," 116 U. PENN. L. REV. 889 (1968)..... 14
Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39.....7, 13
Homburger, "State Class Actions and the Federal Rule," 71 COLUM. L. REV. 608 (1971)..... 14
Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 HARV. L. REV. 356 (1967) 7

Miscellaneous cont.: Page

Kaplan, "A Prefatory Note," 10 B.C. IND. & COMM. L. REV. 497 (1970)..... 14

Maraist & Sharp, "Federal Procedure's Troubled Marriage: Due Process and the Class Action," 49 TEXAS L. REV. 1 (1970)..... 14

McCall, "Due Process and Consumer Protection (Etc.)," 25 HASTINGS L. J. 1351 (1974)..... 14

Miller, "Problems of Giving Notice In Class Actions," 58 F.R.D. 299..... 13

Note, "Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs By Defendant In A Class Action Rejected," 73 COLUM. L. REV. 1641 (1973)..... 14

Note, "Class Actions Under Federal Rule 23(b)(3) -- The Notice Requirement," 29 MD. L. REV. 139 (1969)..... 14

Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacquelin," 87 HARV. L. REV. 426 (1973)..... 14

Note, "Proposed Rule 23: Class Actions Reclassified," 51 VA. L. REV. 629 (1965)..... 14

Miscellaneous cont.: Page

Note, "Collateral Attack on the Binding Effect of Class Action Judgments," 87 HARV. L. REV. 589 (1974)..... 21

Pomerantz, "The 'Notice To The Class' Under The Amended Rule 23," 1968 PRACTICING LAW INST. 33 (1968)..... 14

Wright & Miller, FEDERAL PRACTICE AND PROCEDURE... .....12, 13, 18

Wright, "Class Actions," 47 F.R.D. 169..... 13

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INTRODUCTION

This Brief Amici Curiae is filed without motion, as permitted by Rule 42, the prior consent of the parties having been obtained. See Exhibits A and B hereto.

Amici are all public interest law firms that frequently litigate matters on behalf of classes of individuals (largely poor individuals) whose rights can be adequately protected only by means of the provisions of Rule 23(b)(2), Fed. R. Civ. Proc. Because such litigative activity of amici would be gravely impaired by a holding that the Due Process clauses of the Fifth and Fourteenth Amendments required notice to the absent class members of such a class, amici submit the following Brief.

SUMMARY OF ARGUMENT

Due Process does not require that notice be given to the absent members of a class when the class action is certified pursuant to Rule 23(b)(2), Fed. R. Civ. Proc. Such a class is quite cohesive in character such that the members of the class are nearly fungible. Due Process is satisfied by the firm assurance that the named plaintiffs adequately represent the absent members of the class. Such assurance can be achieved, in nearly all cases without notice. However, when notice is deemed necessary under the circumstances, Rule 23(d) (2) provides for such discretionary notice to the extent deemed advisable by the District Court.

INDIVIDUALIZED NOTICE TO MEMBERS OF THE CLASS IS NOT REQUIRED IN THIS CASE

Amici agree with appellees' position that SSA waived any objection they may have had to a class action. However, amici deem it necessary to elaborate upon SSA's completely unilluminating assertion that notice is required pursuant to Rule 23, Fed. R. Civ. Proc., Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 564-65 (2d Cir. 1969) (commonly called "Eisen II") and this Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The best possible notice, including individualized notice is clearly required in a Rule 23(b)(3) class action. But the requirement of notice exists because of 1/ the clear command of Rule 23(c)(2), not be-

1/ Rule 23(c)(2) Federal Rules of Civil Procedure reads as follows:

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice to all members who can be identified through reasonable effort.

cause of the Due Process Clause. Eisen v. Carlisle & Jacquelin, supra, at 177. By its terms, the mandatory notice requirement of Rule 23 (c) (2) is inapplicable to a Rule 23(b)(2) 2/ class action, such as the present one. Id., 177, n. 14. In a Rule 23(b)(2) class action, notice may be given if, in the sound discretion of the Court, notice is deemed necessary "for the protection of the members of the class, or otherwise for the fair conduct of the action . . . ." Fed. R. Civ.

The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

2/ Rule 23(b)(2) provides that an action may be maintained as a class action if the requirements of subdivision (a) are satisfied, and in addition:

"the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

P., Rule 23(d)(2). If a court exercises its discretion to require notice, it may provide that notice be given "to some or all of the members [at] any step of the action. . . ." Id. The court may advise, in its sound discretion, some or all of the members of the class "of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action. . . ." Id.

This express distinction in Rule 23 between mandatory and discretionary notice comes heavily freighted with a presumption that it does not transgress "constitutional restrictions." Hannah v. Plumer, 380 U.S. 460, 471 (1965); 2 Moore, FED. PRAC. (2d Ed., 1974) §1.04(4), p. 231; Professor Moore characterizes this as a "strong presumption." 3B Moore, FED. PRAC. §23.55, p. 23-1152 (2d Ed., 1974). Judge Frankel, in discussing this distinction, refers to the "weighty presumption of validity with which the Supreme Court's imprimatur invests the rule . . . ." Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 45. The Advisory Committee on Federal Rules, after over a decade of deliberation, prior to proposing the Rules to this Court specifically noted that the mandatory-discretionary distinction "was designed to fulfill the requirements of due process. . . ." Advisory Comm. Notes, 39 F.R.D. 69, 107 (1966). 3/

The basis for these differing notice provisions lies in the differing nature of Rule 23(b)(3) and Rule 23(b)(2) class actions. In the typical Rule 23(b)(3) class action, the plaintiff and the class members are loosely associated by common

3/ For a detailed history of the adoption of the 1966 Rules, see Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 HARV. L. REV. 356, 356-58 (1967).

questions of law and fact which "predominate over any questions affecting only individual members." Fed. R. Civ. P., Rule 23(b)(3) (emphasis added). In many instances, each member will be affected by unique factual issues or special defenses which can defeat that particular claim. The classic cases are the consumer class actions, (see Vasquez v. Superior Court, 4 Cal.3d 800 (1971), or securities fraud (see Eisen v. Carlisle & Jacquelin. supra). Moreover, a particular class member may generally not desire the relief which the plaintiff seeks. In a consumer class action for rescission of contract, for example, many class members may desire their contracts to remain in force notwithstanding defendant's conduct. Thus, there is logic to the requirement of individual notice which affords the class member the opportunity to opt out of the action or to intervene.

By contrast, a Rule 23(b)(2) class is generally much more cohesive. In such a case,

"the party opposing the class is acted or refused to act on grounds generally applicable to the class as a whole. . . ." Fed. R. Civ. Proc., Rule 23(b)(2). The rights asserted by the class representative would, if established, clearly benefit the entire class. It would be surprising, indeed, to find a member of the class at bar who would say, "I prefer to forego the several thousand dollars which has been denied me since I was unconstitutionally denied my survivor's benefits." Professor Moore has referred to the welfare class action as a paradigm. In these cases, "Injunctions are sought and relief could in no way harm the class members, [therefore] the notice question appears to be of very little importance." 3B Moore, FED. PRAC. §23.05, p. 33, n. 30, and cases cited therein.

For these reasons, the members of a Rule 23(b)(2) class action are not given the chance to opt out. Housing Authority of the City of Omaha

v. United States Housing Authority, 54 F.R.D. 402, 404 (D. Neb. 1972); Gonzales v. Cassidy, 474 F.2d 67, 74, n. 12 (5th Cir. 1973), and cases cited therein. Because they do not have the choice of opting out, notice to a Rule 23(b)(2) class only serves to allow those class members who may wish to do so the opportunity to intervene. However, intervention will only be granted if the intervenor demonstrates inadequate representation on the part of the named parties. Rule 24(a), Fed. R. Civ. Proc. A court is, of course, free to direct notice to the members of a Rule 23(b)(2) class at any time it believes it necessary "for the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. Proc., Rule 23(d)(2).

The precise operation of the discretionary notice applicable in a Rule 23(b)(2) case can be seen in two decisions of Judge Flannery of the District Court for the District of Columbia, Arey v.

Providence Hospital, 55 F.R.D. 62, 70-72 (D.D.C. 1972) and Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972). In Arey, the named plaintiff alleged a widespread pattern of discriminatory employment practices, based on both race and sex, in violation of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq. The Court required notice to the members of the Rule 23(b)(2) class because it believed that "feedback from the known class members would be instructive and aid the court by providing information as to the scope of the class the the scope and diversity of discrimination claims, thereby allowing the court to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself." 55 F.R.D. at 71 (emphasis added).

In Woodward, Judge Flannery cited his decision in Arey as an example of the court exer-

cising its discretion under Rule 23(d)(2) to require notice and then went on to say:

> "In the particular circumstances of this case, however, where the adequacy of the representation of the class interests by the named parties is clear, where no apparent purpose would be served by notice to this wide-ranging class even if notice were at all practicable, and where, indeed, judgment is in favor of the class, the essential requisites of due process have been met without further notice." 344 F.Supp. at 980, n. 10.

In focusing upon the adequacy of representation, rather than notice, the Woodward opinion is consistent with the views expressed by this Court in Hansberry v. Lee, 311 U.S. 32 (1940) as well as the majority of courts[4/] and all the commen-

4/ The leading case is Northern Natural Gas Co. v. Grounds, 292 F.Supp. 619, 636 (D. C. Kan. 1968), rev'd in part on other grounds, 441 F.2d 704 (10th Cir. 1971), cert. den., 404 U.S. 951 (1971). See also, 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, §1786, p. 142, n. 99, p. 143, n. 2; Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Hammond V. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Vaughns v. Board of Ed. of Prince George's County, 355 F. Supp. 1034, 1035 (D. Md. 1972); Woodward v. Rogers, 344 F.Supp. 974, 980, n. 10 (D.D.C. 1972); Richardson v. Fargo, 61 F.R.D. 641, 644 (E.D. Pa. 1974); Johnson v. Baton Rouge, 50 F. R.D. 295, 301 (E.D. La. 1970); Rosado v. Wyman, 322 F.Supp. 1173, 1192-94, aff'd, 437 F.2d 619, 624 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971); Solman v. Shapiro, 300 F.Supp. 409, 411, n. 1 (D. Conn. 1969), aff'd, 396 U.S. 5 (1970); Citizen's Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973), aff'd, 484 F.2d 870 (10th Cir. 1973); Lynch v. Household Finance Co., 360 F.Supp. 720, 722, n. 3 (D. Conn. 1973); Baxter v. Savannah Sugar Refining Co, 350 F. Supp. 139, 141 (S. D. Ga. 1972); Williams v. Local 19, 59 F.R.D. 49, 55-56 (E.D. Pa. 1973); Mungin v. Florida E. Coast R.R. Co., 318 F. Supp. 720, 732 (M.D. Fla. 1970); Moss v. Lane Co., 50 F.R.D. 122, 126 (W.D. Va. 1970); Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D. Ill. 1970).

ators[5/] who have spoken to the issue.

In Hansberry v. Lee, supra, the plaintiffs sought to enforce a racially restrictive covenant against the defendants, a black family who had

5/ Most notable are 3B Moore, FED. PRAC. § 23.05, p. 23-275, n. 30 (1973 Supp.), § 23.55, pp. 1151-53, and 1973 Supp. thereto; 7A Wright & Miller, supra, § 1786, pp. 142-44 and Supp. thereto; Miller, "Problems of Giving Notice in Class Actions", 58 F.R.D. 299, 313-17; Wright, "Class Actions", 47 F.R.D. 169, 177-82; Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 45-46; Homburger,

purchased property within a restricted zone. Plaintiffs' case turned on whether the covenant was then in effect. This question turned on whether the covenant had been signed by a sufficient number of property owners. The lower courts

"State Class Actions and the Federal Rule", 71 COLUM. L. REV. 608, 643-47 (1971); Note, "Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in a Class Action Rejected, 73 COLUM. L. REV. 1641, 1650-52; Kaplan, "A Prefatory Note", 10 B.C. IND. & COMM. L. REV. 497, 499 (1970); Maraist & Sharp, "Federal Procedure's Troubled Marriage: Due Process and the Class Action", 49 TEXAS L. REV. 1 (1970); Pomerantz, "The 'Notice To The Class' Under the Amended Rule 23", 1968 PRACTICING LAW INST. 33 (1968); Comment, "Constitutional & Statutory Requirements of Notice Under Rule 23(c)(2)", 10 B.C. IND. & COMM. L. REV. 571, 573 (1969); Note, "Class Actions Under Federal Rule 23(b)(3) -- The Notice Requirement", 29 MD. L. REV. 139, 153-54 (1969); Comment, "Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws", 116 U. PA. L. REV. 889, 914 (1968); Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacqueline", 87 HARV. L. REV. 426, 433-41 (1973); Note, "Proposed Rule 23: Class Actions Reclassified", 51 VA. L. REV. 629, 654 (1965); McCall, "Due Process and Consumer Protection (Etc.)", 25 HASTINGS L.J. 1351, 1389, ff. (1974).

had held that, since a previous "class action" had found that the requisite number of signatures had been obtained, res judicata precluded the defendant from relitigating that issue of fact. This Court reversed the res judicata finding, not on the ground that the defendant had not received notice of the earlier action, but because their interests had not been adequately represented by the parties thereto. Id., 311 U.S. at 42-43. This Court stated:

> "[W]hen the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could. . . constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure was so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." Id., 311 U.S. at 43.

This Court appears to have taken the position that adequate representation, absent any notice at all, satisfied Due Process, that the very best notice, absent adequate representation, is a

Constitutional nullity. The Hansberry opinion recited the general rule that a person is not bound by a judgment in an action to which he has not been made a party by service of process, 311 U.S. at 40, citing cases, but went on to add that the class action is a recognized exception to that rule:

> "In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." 311 U.S. at 41-42.

A recent example of the Hansberry analytical framework is to be found in Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). There, the issue was whether plaintiff and the class he sought to represent were bound by the res judicata effect of the previous decision involving the class (represented by a different plaintiff), the same defendants, and the same issues. The previous suit had been certified as a Rule 23(b)(2) class

action. The Court held that the "Gonzales class" was not bound by the previous judgment since the class representative had failed to appeal the adverse judgment in that case, thus the representation had been inadequate. Id., 474 F.2d at 75.

The defendant argued in Gonzales that the "Gonzales class" was bound because Gonzales at least was given notice of the adverse decision in the prior case and had time to intervene for purposes of appeal but failed to do so. In holding that the receipt of notice by a class member did not cure the Constitutional defect of inadequate representation, the Court said:

> "[A]s the 1966 amendments to Rule 23 clearly illustrate, the purpose of a class action is to allow as few as one member of a class to prosecute an action for the benefit of the class if the requirements of 23(a) and (b) are met. This is one reason why the requirement of 23(a)(4) is stringently applied. The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his respons-

> ibility it is the responsibility of the class representative to protect the interests of all class members." Id., 474 F.2d at 76.

Adequacy of representation has come to mean more than just the absence of conflict between the named class representative and the unnamed members of the class. It includes "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the class, so as to insure them due process." Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968); 7A Wright & Miller FED. PRAC. & PROC., § 1786. Several courts have specifically found that in income maintenance cases, such as the case before the Court, representation by experienced legal aid attorneys assures adequate representation of the class interests. Serritella v. Engelman, 339 F.Supp. 738, 748 (D.N.J. 1972), aff'd, 462 F.2d 601 (3d Cir. 1972); Almanares v. Wyman, 334 F.Supp. 512, 518-19 (S.D.N.Y. 1971).

The basic proposition of Eisen II and its progeny is that since a class judgment is binding on the entire class, absent members are denied Due Process if they do not receive notice of the pendency of the action. Curiously, this jus tertii argument is always ardently advanced by defendants on behalf of potential members of the plaintiff class. Looked at more realistically, defendants who pursue this line of reasoning seek to avoid broader liability for their wrongs under the guise of heated advocacy of the Constitutional rights of those who are in fact their victims. This bizarre posture is made possible by application of the Eisen II reasoning that the interests of the missing class members will be fundamentally prejudiced unless notice is given.

Three of the cases in the Eisen II line go even further and look not to the interests of the missing plaintiffs but rather to the interests of the defendant. See Schrader v. Selective Service

System, Local Board 76, 470 F.2d 73, 75 (7th Cir. 1972); Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972); Pasquier v. Tarr, 318 F.Supp. 1350, 1354 (E.D. La. 1970), aff'd, 444 F.2d 116 (5th Cir. 1971). (The Sixth and Seventh Circuit opinions rely upon the Pasquier District Court opinion.) These are a queer family. Each is an offspring of Gregory v. Hershey, 311 F.Supp.1 (E. D. Mich. 1969), rev'd, 436 F.2d 513 (6th Cir. 1971), cert. den., 403 U.S. 922 (1971). The District Court in Gregory issued an injunction on behalf of a nationwide Rule 23(b)(2) class ordering the defendant Director of the Selective Service System to grant a certain deferment to all members of the class and enjoining their induction into the Army. Although the judgment was not stayed on appeal, nor was the certification of the class raised as an issue on appeal (see Schrader, supra, 470 F.2d at 7778, Eschbach, D. J., dissenting), the defendant refused to obey the order as to the

class. Pasquier and its progeny refused to give res judicata effect to the Gregory judgment in enforcement actions brought by purported members of the class, stating as their reason that the class certification was ineffective because no individual notice had been given to the members of the class. 6/

The holding of the Pasquier District Court opinion is that individual notice is necessary to assure "fundamental fairness," Id., 318 F.Supp. at 1354, to defendants because absence such notice, a decision favorable to a defendant may not have res judicata effect. Without such effect, the absent class members could relitigate the issue on the merits, thus leaving such a defendant "in a most precarious position, [and] we simply cannot subscribe to a rule of law with such unfair conse-

6/ For more about the "Gregory" family, see Note, "Collateral Attack on the Binding Effect of Class Action Judgments," 87 HARV. L. REV. 589, 596, n. 52 (1974).

For a court which refused to join the family, see Germonprez v. Director of Selective Service, 318 F.Supp. 829 (D.D.C. 1970).

quences." Ibid. To test the soundness of the Court's reasoning, one need only consider what would happen if notice is required to be given by the named plaintiffs to a nationwide class, but the plaintiffs, due to their indigency or other causes, simply cannot give the notice. According to the Pasquier reasoning, the case must of necessity proceed only as to the named plaintiffs. If judgment is rendered in favor of the defendant, is he or she removed from that "most precarious position" of still being subject to suit by other members of the class? No. Indeed, this is the ordinary case; the class action is the exception.

Pasquier and its progeny may be explained by the firm belief that Gregory was wrongly decided on the merits (which, it turned out, it was) and the strong emotions connected with the Selective Service System and the Vietnamese War. Both of these factors were suggested in Judge Eschbach's strong dissent in Schrader, 470 F.2d at 77-78.

Subsequent decisions on Rule 23(b)(2) class actions in the Fifth Circuit have not followed Pasquier, but have affirmed that notice in such cases is discretionary, not mandatory. See Bing v. Roadway Express, Inc., 485 F.2d 441, 448 (5th Cir. 1973); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139, 141 (S. D. Ga. 1972); Owens v. Roberts, 377 F. Supp. 45, 55-56 (N. D. Fla. 1974).

It would also appear the Eisen II dictum is no longer given credence even in the Second Circuit itself. In two post-Eisen II welfare cases, the Second Circuit has affirmed class certification without any reference to notice. Rosado v. Wyman, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971); and Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. den., 405 U.S. 944 (1972).

In Almenares, the District Court certified a class of 1,500,000 New York welfare recipients.

Almenares v. Wyman, 334 F.Supp. 512, 518-19 (S.D.N.Y. 1971). The Court took "note of the fact that the attorneys representing plaintiffs. . . are public service legal organizations experienced in litigation of this nature. It may be presumed that they will represent plaintiffs in a fashion that will fairly and adequately represent the interests of the class. Having thus found adequacy of representation, the Court certified the class without requiring notice. Judge Friendly, in his opinion affirming the District Court, specifically treated the class action issues at length and specifically recognized the distinction between Rule 23(b)(2) and (b)(3) cases. Almenares v. Wyman, supra, 453 F.2d at 1084-86, esp. 1086, n. 15a. No notice was required.

In Rosado, the District Court certified a class of 1,500,000 New York welfare recipients giving extended consideration to class action questions. Rosado v. Wyman, 332 F.Supp. 1173, 1191-

94 (E.D.N.Y. 1970). Judge Weinstein's primary emphasis was on adequacy of representation; he said:

> "This case has been widely noted in the press. See, e.g., National Institute for Education and Law and Poverty, 3 Clearinghouse Review 54 (1969); id. at 82; id. at 321. There are many legal offices upstate devoted to protecting welfare clients and other poor. Any of them could have, if they were so advised, intervened in this action at any time. That they have not done so suggests that they believe that the plaintiffs' attorneys were properly carrying forward the suit. Silence with knowledge has considerable significance in a case of possible conflict. C.f., Snyder v. Board of Trustees of the University of Illinois, 286 F. Supp. 927, 931, 937 (N.D. Ill. 1968)." 322 F.Supp. at 1193.

The Second Circuit affirmed. 437 F.2d 619, 624 (1970). No notice was required. It is significant that two of the three judges on the Second Circuit's Rosado panel, Judge Hayes and Chief Judge Lombard, were on the Eisen II panel.

Most persuasively, the recent case of

Lynch v. Household Finance Corp., 360 F. Supp. 720 (D. Conn. 1973) demonstrates the lack of vitality of Eisen II even in the Second Circuit. Second Circuit Judge Anderson's opinion for the pre-judge court in Lynch, concurred in by Second Circuit Judge Timbers and District Judge Zampano, spells the death-knell for Eisen II and its progeny:

> "This is a proper class action under F. R. CIV. P. 23(b)(2), because an injunction and a declaratory judgment were the only relief sought. Notice to members of the classes was neither given nor required in this case. Hansberry v. Lee, 311 U.S. 32, 41-43, 61 S. Ct. 115, 85 L. Ed. 22 (1940); see, also, Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Wilczynski v. Harder, 323 F.Supp. 509, 512, n. 3 (D. Conn. 1971); Solman v. Shapiro, 300 F.Supp. 409, 411, n. 1 (D. Conn. 1969), aff'd, 396 U.S. 5, 90 S. Ct. 25, 24 L. Ed.2d 5 (1969); Comment of the Advisory Committee, 39 F.R. D. 69, 106-07 (1966); 3B J. Moore, Federal Practice ¶ 23.55, at 23-1152-53, ¶ 23.72, at 23.1421-11 (2d ed. 1969). The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately

> represent the classes, the Commercial Law League is a participant as an amicus curiae for the defendants, and the legal constitutional issue is not complex in light of the recent Supreme Court decisions. Although it is suggested that dictum in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-565 (2d Cir. 1969) [Eisen II], requires notice in all class actions, see Moore, supra, we read Eisen simply to say that notice is required in all class actions when due process so requires. Furthermore, notice of the proceedings was given to the Governor and the Attorney General of Connecticut pursuant to 28 U.S. Code § 2284." Id., at 722, n. 3.

CONCLUSION

We believe that the foregoing analysis demonstrates that the Government's claim that Due Process requires notice in a Rule 23(b)(2) class action, Jurisdictional Statement at 13, n. 9, is in error and therefore we urge affirmance.

DATED: San Francisco, California

February 19, 1975.

Respectfully submitted,

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By _____
RALPH SANTIAGO ABASCAL

Office of the Solicitor General
Washington, D.C. 20530

February 13, 1975

Ralph Santiago Abascal, Esq.
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San Francisco Neighborhood
Legal Assistance Foundation
1095 Market Street--Suite 302
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Re: Weinberger v. Salfi (No. 74-214)

Dear Mr. Abascal:

As requested in your letter of February 10, 1975, I consent to the filing of a brief amicus curiae in the above case by the San Francisco Neighborhood Legal Assistance, Inc., Western Center on Law and Poverty, Inc., National Organization for Women, Inc., Mexican-American Legal Defense and Education Fund, Inc., Food Advocates, the American Civil Liberties Union of Northern California, Inc. and the Charles R. Drew Health Rights Project of the Charles R. Drew Post-Graduate Medical School, Los Angeles, California.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

LEGAL AID SOCIETY OF SAN MATEO COUNTY

PETER H. REID
EXECUTIVE DIRECTOR

2221 BROADWAY
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December 31, 1974

Ralph Abascal, Esq.
San Francisco Neighborhood
Legal Assistance Foundation
1095 Market St. #302
San Francisco, CA 94103

Re: Salfi v. Weinberger
U.S. Sup. Ct. O.T. 1974
No. 73-214

Dear Ralph:

I am writing to confirm our consent to the filing of an amicus brief by you and other interested parties in the above-entitled matter. Thank you for your assistance and cooperation. We shall forward a copy of the government's brief to you as soon as received.

Very truly yours,

BRUCE N. BERWALD
Attorney at Law

BNb:bc